DOCUMENT RESUME

ED 345 668 HE 025 569

AUTHOR Wangerin, Paul T.
TITLE Skills Training in "Legal Analysis": A Systematic Approach.
PUB DATE Jan 86
NOTE 78p.; Footnotes are in very small print.
PUB TYPE Journal Articles (080)
JOURNAL CIT University of Miami Law Review; v40 n2 p409-85 Jan 1986

EDRS PRICE MF01/PC04 Plus Postage.
DESCRIPTORS Higher Education; Law Students; Learning Activities; *Learning Strategies; *Legal Education (Professions); Memory; Mnemonics; Skill Development; Thinking Skills; Writing Strategies
IDENTIFIERS *Dialectical Reasoning

ABSTRACT

This paper describes a systematic method for teaching first year law students dialectical skills. An introductory section, Part I, critiques the traditional format for law education noting that at most schools, instruction in substantive courses impart knowledge but not the skills lawyers need in practicing their professions. Part II discusses, in a preliminary fashion, the idea of "thinking like a lawyer." It also defines and describes six individual skills in an attempt to divide up the dialectical skill of legal analysis into several discrete parts: (1) the skill of using facts; (2) the skill of using statutes; (3) the skill of using "synthesis"; (4) the skill of using analogies; (5) the skill of using "policy"; and (6) the skill of "reconciling" apparent contradictions. Part III explores some aspects of classroom teaching of dialectical skills including drill, syllabus development, recipes for construction of legal arguments, and the teacher as coach. The paper concludes with a call for combating the alien qualities generated by legal education through teacher willingness to transform their approach to instruction and their students. Included are 132 footnotes. (JB)

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University of Miami Law Review

VOLUME 40 JANUARY 1986 NUMBER 2

Skills Training In "Legal Analysis": A Systematic Approach

PAUL T. WANGERIN*

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I. INTRODUCTION

Law school teachers often try to dazzle their students with bizarre hypotheticals. None is more bizarre, however, than this one, a law school education staged by the makers of the cult movie, *The Invasion of the Body Snatchers*. The facts: Students enter this law school young and idealistic. To be sure, they desire material success, but they want to achieve it while leading an upright life, a life of prin-

* Associate Professor of Law, John Marshall Law School. Many people have read earlier drafts of this paper. In particular, David Bryden, Fernand Dutile, Eric Holmes, Alan Hornstein, the Honorable Robert Keeton, Charles Kelso, Kurt Strasser, and Dean Stephen Young have given me many helpful suggestions and much encouragement. All of them have written extensively about the general topic of this paper. My colleague, Walter Kendall, has also been instrumental in clarifying my thinking. Hundreds of students have read this paper as it progressed through scores of versions. What I learned from these students is impossible to measure. My greatest debt, however, is to a lawyer under whose supervision I practiced for several years, Bruce L. Bower, a great teacher.

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ciple in a noble profession. Unknown to the students at this school, and simply forgotten by everyone else, is a dusty and unused room hidden deep in the library's endless corridors. In that room stand row upon row of human-sized "pods." No one sees the pods; no one knows of their existence. Month after month the new students at this strange law school go to class. They study the intricacies of various fields of law. They learn skills of analysis, and skills more practical in nature. The pods remain undisturbed. About halfway through their studies, however, the students start losing interest. Boredom begins setting in for all, apprehension for some. Many sleep in class. As the students enter their third year, the routine continues. They take the same class over and over. Only the names of the courses have been changed. Teachers endlessly instruct them in the same skills. More and more students drift off to sleep. And then, an amazing thing happens. School ends. The students, all of whom now sleep soundly, shrivel into dust and disappear. Simultaneously, off in the hidden library room, the pods break open. From each emerges an exact replica of a now vanished student, an alien creature physically indistinguishable from the student it replaces. The aliens then go off to graduation. The students' friends and families sense some sort of change, some sort of difference, but dismiss their worries out of hand. The aliens, unnoticed, gradually take over the legal profession. They, and future students graduating from this law school, also aliens, ultimately take over the world.

Law school hypotheticals necessarily end with questions. The present one poses two, the first of which is easily answered. Does some sort of transformation occur in students as they progress through law school, one that makes them somehow less human, less concerned about normal human morality? Anyone familiar with the effect of legal education on students will agree that some kind of transformation does occur. Furthermore, many will admit that the transformation is not a positive one. That point, however, will not be debated herein. The pods hypothetical poses a second question, one much more difficult to answer. What is it about law school, about legal education, that brings about this change, whatever its nature? This question can only be answered in the context of the "skills" legal education teaches, particularly the skill of "legal analysis," of "thinking like a lawyer." Only through a thorough understanding of this skill can teachers adequately help their students learn it.[1] More

1. Some of my colleagues have remarked that I have exceeded even my normal degree of presumptuousness by writing so soon on legal education topics. (I began teaching in 1982.) Professor Karl Llewellyn commented on this exact point in the foreword to *The Bramble*

importantly, only through such an understanding can teachers help students combat the negative side-effects inevitably generated by learning it.

Skills[2] can be divided into two categories. "Dialectical" skills

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Bush. Professor Llewellyn described why he did not complete a planned rewrite of materials written many years before. "The young fellow who wrote these lectures," he said, "just isn't here any more. . . ." K. LLEWELLYN, THE BRAMBLE BUSH 7 (1960).

Professor Llewellyn also eloquently defended the preparation of student focused papers like this one:

> My own efforts in this direction, from THE BRAMBLE BUSH on, make it clear, I hope, that I am talking about seriously and deeply considered expression. I have in print three jobs of this character. . . . I think that those of us who try it must be ready to take what comes. I also think that if enough of us try it, labelling what they do as what it is: honest and pondered work *for students*, that we can shame attack out of any premises but: Is it honest? and is it pondered? There are blobs in both of my later lectures mentioned above, which in my view are much greater than *those that have been attacked* in BRAMBLE BUSH (as distinct from the real blobs in that book). I see no reason for apology. I have written the best I knew, *I think it not worth listening to if it is not worth printing*, and I correct it, in lecture as in print, as fast as I find out better. As an educator I cannot understand why *beginners* should be kept from *partial* help because I cannot, as a scholar, give *completed* answers. And I hold that that is good doctrine for our whole tribe.

Llewellyn, *Lawyer's Ways and Means, and the Law Curriculum*, 30 IOWA L. REV. 333, 338 n.1 (1945); *see* Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651, 676-77 (1935).

An even more important justification exists for one's writing a paper like this while a newcomer to teaching. Many first year teachers will agree that first year courses primarily teach skills. The subject matter of the courses, these teachers maintain, is primarily a vehicle for teaching skills. If this is true, and I think it is, should not a new teacher's first area of scholarly inquiry be aimed at skills rather than at subject matter? Of course, this is not the standard practice. Professor Mazor decries the lack of formal exchange of written information regarding teaching activity:

> Although occasional reports of teaching and research activity appear, most law teachers are reluctant to put into print a description of the work that they are doing if they cannot surround it with the trappings of scholarly importance, and many seem to believe that the safest course is to rely entirely on informal methods of communication. As the size of the law teaching enterprise has grown, the informal communications network has become less and less adequate to transmit information about new possibilities in legal education.

Mazor, *The Materials of Law Study: 1971*, in H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 319, 320-21 (1972).

The most thought provoking article I have encountered on legal education, the one to which I have returned most often in my own studies, addresses skills only tangentially. Nevertheless, its comments on first year courses stimulated many of the ideas contained in this paper. Peairs, *Essay on the Teaching of Law*, 12 J. LEGAL EDUC. 323 (1960). Many other authors have also written on similar topics. The 1978 New York University Law Review Symposium on Legal Education concludes with an exhaustive bibliography citing many of these works. Ryan, *Legal Education: A Selective Bibliography*, 53 N.Y.U. L. REV. 703 (1978); *see* CENTRE FOR STUDIES IN CANADIAN LEGAL EDUCATION, ESSAYS ON LEGAL EDUCATION (N. Gold ed. 1982).

2. I use the word "skill" advisedly in connection with the discussion of the process of legal analysis. An artificial distinction has grown up between traditional "substance" first year courses (for example, torts, contracts, and property), and "skills" courses (for example, legal

comprise one set. These skills include learning how to read and analyze cases, statutes, and regulations, and how to construct legal arguments. The other skills are "Practical," such as methods and tactics. Teachers of practical skills help students learn how to do legal research, to collect and sort facts, to interview, counsel, and negotiate, and to organize and manage legal work.[3] As a general rule, clinical or simulation courses teach practical skills. "Substantive" courses supposedly teach Dialectical skills.[4] Most who teach substantive courses

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writing, moot court, and trial advocacy). Both kinds of courses teach skills, though, to be sure, different kinds of skills. Judge Rubin agrees that the "skills" designation can describe the skill of legal analysis. Rubin, *The Need for Greater Emphasis on Skills Development*, in LEGAL EDUCATION AND LAWYER COMPETENCY 16, 18 (F. Dutile ed. 1982); *see* Vernon, *Education for Proficiency: The Continuum*, 33 J. LEGAL EDUC. 559, 561 (1983); *see also* Gross, *Intellect Beyond Law: The Case of Legal Education*, 33 CLEV. ST. L. REV. 391 (1985) (discussing skills taught in legal education in the context of differing philosophic conceptions of the intellect). Professor Rutter has remarked that doctrinal study "constitutes an intensely practical skill, perhaps the most important single skill of the practicing lawyer." Rutter, *A Jurisprudence of Lawyers' Operations*, 13 J. LEGAL EDUC. 301, 307 (1961).

3. This list of skills is drawn from the Cramton committee report. TASK FORCE, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 8-10 (1979). Professor Vernon proposes a more elaborate description of overall lawyer competency, and suggests that a lawyer is competent if he or she:

> (1) Is well grounded in legal doctrine and legal analysis—in essence is able to undertake legal analysis in the traditional sense and perform library research;
>
> (2) Understands not only the legal rules but their social, political, economic, historical, and philosophical backgrounds—in essence, can put the rules into context;
>
> (3) Understands judicial, administrative, and legislative processes and procedures;
>
> (4) Is a master of a wide variety of lawyering skills not directly related to legal theory as such, e.g., interviewing, fact investigation, counseling, drafting, negotiation, mediation, advocacy, and the like;
>
> (5) Understands the theoretical foundation of lawyering skills as well as he understands legal doctrine;
>
> (6) Is able to communicate effectively, both orally and in writing;
>
> (7) Understands and acts with awareness of the profession's ethics, including obligations to clients, society, courts and other lawyers;
>
> (8) Understands both the theory and mechanics of the way in which disputes are avoided and alternative or non judicial dispute resolution techniques;
>
> (9) Has a working knowledge of human nature and empathy for people with problems;
>
> (10) Is committed to the work ethic and to self-imposed high standards in the performance of professional obligations.

Vernon, *Education for Proficiency: The Continuum*, 33 J. LEGAL EDUC. 559, 560 (1983).

4. Strong, *A New Curriculum for the College of Law of The Ohio State University*, 11 OHIO ST. L.J. 44, 48 (1950); *see* Kelso & Kelso, *The Future of Legal Education for Practical Skills: Can the Innovations Survive?*, 1977 B.Y.U. L. REV. 1007. I use consciously the word "supposedly" in the text. Professor Harry Jones argued years ago that one of the principal causes of confusion in the first year of law school is that a student simply has "no understanding as to what his instructors are trying to do." Jones, *Notes on the Teaching of*

will indeed acknowledge that dialectical skills should be a principal

Legal Method, 1 J. LEGAL EDUC. 13, 13 (1948). Arguably, students do not understand because their teachers do not understand.

It is generally agreed that courses traditionally described as "substantive" serve, or should serve, as vehicles for skills training, at least if skills training includes the skill of legal analysis. Professor Karl Llewellyn was, of course, the most significant advocate of this view. *See* Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948); Llewellyn, *Lawyer's Ways and Means, and the Law Curriculum*, 30 IOWA L. REV. 333, 335 (1945) ("mis-emphasis on 'subject-matter' as the center of courses taught in class"); Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935). An important recent essay describes the skills training that Professor Llewellyn taught in his "Elements of the Law" class at the University of Chicago. Gerwin & Shupack, *Karl Llewellyn's Legal Method Course: Elements of Law and Its Teaching Materials*, 33 J. LEGAL EDUC. 64 (1983).

Professor Llewellyn's most provocative statement on skills is found in an infrequently cited essay:

> We have fooled ourselves, we have fooled our law professors, we have fooled the whole bewildered public, into the idea that the essence of our craft lies in our knowledge of the law. And knowledge of the law we do have, and we do need, but such knowledge is but the precondition of our work.
>
> . . .Let me say it again: the essence of our craftsmanship lies in skills, and wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for *regularizing* the results, for building into controlled large-scale action such doing of things and such moving of men.
>
> But we do not say this, even to ourselves. Why not? Does it seem too plain, too ordinary, too much like what needs no license via bar examination? I do not know. What I do know is that *because* we do not say it to ourselves we do not study our own essence as we need to, we do not train every lawyer in it, we do not have and cannot yet phrase or apply standards of minimum competence in it, we do not require entrants to qualify in it, we learn it, each one of us, only by slow unreckonable accident, happenstance or inborn artistry.

Llewellyn, *The Crafts of Law Re-valued*, 15 ROCKY MTN. L. REV. 1, 2-4 (1942).

Other influential teachers have agreed. For example, Professor Jones argues that students must learn about the "tools" of legal analysis before they can do anything contructive with a substantive problem in one of the core first year courses. Jones, *Notes on the Teaching of Legal Method*, 1 J. LEGAL EDUC. 13, 26-27 (1948). Professor Cavers, in an important paper, connects substance with skills by arguing that "the study of skills will promote understanding of the legal materials which traditionally the law student has been called upon to study." Cavers, *"Skills" and Understanding*, 1 J. LEGAL EDUC. 395, 396 (1949). Professor Cavers continues: "The problem of understanding legal materials is essentially one of appreciating the significance they have for the lawyer when he is seeking to resolve the various questions that he is called upon to answer. What, in a given situation, may be the bearing of a given case (or statute, contract, or theory) on a decision that the lawyer must reach?" *Id.* (footnote omitted); *see* Little, *Skills Training in the Torts Course*, 31 J. LEGAL EDUC. 614 (1981) ("practical" skills taught in connection with the substantive law of torts); Vernon, *Education for Proficiency: The Continuum*, 33 J. LEGAL EDUC. 559, 561 (1983).

Although professors seem to agree that they should teach skills in the substantive courses, their practice in these courses may not reflect their agreement. Professor Hornstein, for example, notes "the number of casebooks organized about the doctrinal components of the law when compared with the paucity (non-existence) of casebooks organized around the analytic or reasoning component." Hornstein, *The Myth of Legal Reasoning*, 40 MD. L. REV. 338, 347 n.9 (1981). Professor Shreve argues, as do I, that "skills" can and should be taught not only in traditional skills courses, such as trial advocacy and negotiations, but also throughout the

focus of their courses. For the most part, however, such acknowledgments are mere lip service to the idea. The overwhelming emphasis in

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entire curriculum. Shreve, *Bringing the Educational Reforms of the* Cramton Report *into the Case Method Classroom—Two Models*, 59 WASH. U.L.Q. 793 (1981). After making that observation, however, he describes two models that are, in effect, indistinguishable from clinical/simulation models. His emphasis, thus, on "practical" skills of lawyering negates his prior point. Professor Strasser hints at the idea of using the contracts course for skills training in legal analysis. Strasser, *Teaching Contracts-Present Criticism and a Modest Proposal for Reform*, 31 J. LEGAL EDUC. 63, 82 (1981). Unfortunately, he does not develop these ideas, and his suggestions for change in the course seem to focus heavily on substance. *Roundtable on Contracts*, a series of papers written for teachers of contracts, contains virtually no reference to the course as a vehicle for skills training. 20 J. LEGAL EDUC. 451 (1968). A major recent treatment of developments in legal education reveals the same problem. It addresses the idea of skills briefly, and then only, seemingly, in a context other than that of the skills of legal analysis. *See* Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 877-81, 934.

Examples of how courses focus on substance rather than skills abound. One particularly sinister way involves the methods with which teachers/authors introduce casebooks. For example, all first year casebook authors view their books as tools for the development of legal analysis skills as well as for teaching substantive concepts. Yet the introductions to many of these casebooks make little or no reference to skills as part of their contents. *See, e.g.*, E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS xvii (3d ed. 1980) (brief reference to development of the student's "legal mind"); F. KESSLER & G. GILMORE, CONTRACTS, CASES AND MATERIALS v (2d ed. 1970) (no reference to skills training); E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW xix-xxv (3d ed. 1984) (brief references to thinking like a lawyer and developing analytic skills).

Without question, the authors of all three of these casebooks designed their books to teach skills. (Farnsworth and Young, which I use, is filled with skills exercises. In fact, many of the skills exercises described in this paper grew from my work with this casebook.) Unfortunately, the books do not advise students of their skills purpose in a satisfactory or convincing manner. Other contracts books, to some degree, contain the same weakness. *See, e.g.*, J. CALAMARI & J. PERILLO, CASES AND PROBLEMS on CONTRACTS xiii (1978); M. CLOSEN, R. PERLMUTTER & J. WHITTENBERG, CONTRACTS: CONTEMPORARY CASES COMMENTS AND PROBLEMS xiii (1978); J. DAWSON, W. HARVEY & S. HENDERSON, CONTRACTS: CASES AND COMMENT xii-xviii (4th ed. 1982); D. FESSLER & P. LOISEAUX, CONTRACTS: MORALITY, ECONOMICS AND THE MARKETPLACE xii-xx (1982); M. FREEDMAN, CASES AND MATERIALS ON CONTRACTS xv (1973); L. FULLER & M. EISENBERG, BASIC CONTRACT LAW xv-xvii (4th ed. 1981); R. HAMILTON, A. RAU & R. WEINTRAUB, CONTRACTS: CASES AND MATERIALS xv-xvi (1984); C. KNAPP, PROBLEMS IN CONTRACT LAW xix-xxi (1976); I. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS xvii-xxii (2d ed. 1978); A. MUELLER, A. ROSETT & G. LOPEZ, CONTRACT LAW AND ITS APPLICATION xvii (3d ed. 1983). Not all casebooks, however, make this mistake. Two contracts books, for example, contain extended introductory discussions of skills. J. JACKSON & L. BOLLINGER, CONTRACT LAW IN MODERN SOCIETY xvii-xxvi (2d ed. 1980) (exceptionally good introduction to the analytic skills, methods and purposes of first year law school classes); C. REITZ, CASES AND MATERIALS ON CONTRACTS AS BASIC COMMERCIAL LAW xxviii-xxx (1975) (less elaborate, but helpful analysis of skills).

The problem of balancing the substance and skills components of first year courses is one that seems incapable of resolution. Professor Beale, one of the early masters of classroom legal education, noted that the twofold task was "to make a man into a lawyer by building up in him a legal mind [skills] and by teaching him facts [substance] which will be useful for him in his career as a lawyer. Men will never agree on the proper balance between these two endeavors . . . ." Beale, *Legal Pedagogy, or What Have I?*, 8 NOTRE DAME LAW. 402, 404 (1933). Dean Pound agreed:

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most substantive classes is on substance. Empirical data buttresses that point. In a recent, important paper,[5] Professor David Bryden of the University of Minnesota Law School describes the results of an elaborate experiment, testing students for skills development. His conclusions are ominous. Although students learn substance, they do not seem to develop adequately, in law school, the skills everyone agrees they will need outside, in the profession.[6]

This paper describes a systematic method for teaching first year law students dialectical skills. Part II discusses, in a preliminary fashion, the idea of "thinking like a lawyer." It also defines and describes six individual skills. These six reflect an attempt to divide up the dialectical skill of legal analysis into several discrete parts. Part III explores some aspects of classroom teaching of dialectical skills. The paper concludes with a call for combating the alienness generated by legal education.

Legal educators may find this paper helpful in several ways. By far its best use would be for others to use it as a "model" for individually crafted skills papers which individual teachers could distribute to their own students.[7] Modeling raises a critical point. Without doubt,

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> One of the specific problems of law teaching, an old one but perennial and ever recurring, is maintaining a balance between information and technique, between training with an eye chiefly to practice and training for the higher tasks of the lawyer; for legislation, juristic writing, creative juristic thinking, and wise participation in affairs. The apprentice-type law school of the last century stressed the one exclusively. Many thought that the academic law school of the beginning of the present century by way of reaction put too much emphasis on the other. In the whole history of legal education the two have tended continually to get out of balance. The university teachers of law on the Continent two generations ago, who were so engrossed in systematic development of the principles found by analytical study of the Roman law that they refused to look at the sections of the codes under which they lived, have been succeeded by a type of teacher who can see nothing but those sections and bounds his teaching by the covers of the codes. The historical jurists whose case books a generation ago developed doctrines from obscure fragmentary reports in the Year Books have been succeeded by a generation to which historical continuity is an illusion and each case is a phenomenon sufficiently grounded in its own phenomenality.

Pound, *A Generation of Law Teaching*, 38 MICH. L. REV. 16, 27 (1939).

The balancing problem does not exist only in first year courses. In fact, the principal subject of Dean Steven's masterful book on the history of legal education in the United States is the tension between the theoretical and the practical elements of legal education. R. STEVENS, LAW SCHOOL (1983).

5. Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479 (1984).

6. *Id.* at 490.

7. Professor Parker suggests why each teacher should develop his own approach:

> Quality teaching requires quality action in the classroom, quality exercise in the presence of students of the skills a teacher wants his students to develop. The specific skills that we each teach our students vary from professor to professor. The vague phrases, "to select relevant facts," "to think precisely," "to think

no one can describe a single uniform system of dialectical skills. No

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imaginatively," are only common denominators. Each teacher has a uniquely different way in which he naturally relates to the law. Some relate to it as craftsmen, working with the points of authority provided by the cases and the inferences allowed by the canons of legal reasoning to reach the legally correct result. Some like to cut below the legal forms and lay bare the bones of the basic conceptual relations running through many cases but fully articulated in none. Some like to study the law as a social phenomenon. Some study law as a potential instrument of justice to remedy social wrongs and realize moral ideals. A teacher's relation to law is often much deeper than simply a style of analysis of the sorts listed above. Teachers also exemplify what the law can be to someone: the chance for personal redemption through skill and hard work, or intellectual play for its own sake, or simply one fascinating set of facts after another. The point is that each teacher relates naturally to the law in his own way and it is that relation and the skills necessary to it which is what he has to teach.

Parker, *A Review of* Zen and the Art of Motorcycle Maintenance *with Some Remarks on the Teaching of Law*, 29 RUTGERS L. REV. 318, 328-29 (1976).

Professor Harry Jones, one of the great classroom teachers, has provided another "model" in his description of how to plan a course. Although not clearly stated in his approach, he arguably meant that teachers who prepare written "plans" for their courses, perhaps using his plan as a model, should submit these written documents to their students. Professor Jones provides an elaborate outline for presenting a first year course. His discussion of "planning" the course provides an excellent checklist of classroom goals:

I. Plan the Course
   - A. Determine and state goals in terms as behavioral as possible including emotional as well as intellectual targets.
     1. For example, the goal for a first year course in Contracts might be stated as developing student ability and appetite for reading, thinking, and talking like a lawyer, in understanding legal reasoning, and using legal material to discover and solve problems as would a scholar, advocate, counselor, draftsman, or social activist. One behaves like a lawyer when he respects the facts of cases, exercises caution in accepting doctrine, avoids rule preoccupation, is professionally responsible with respect to accuracy in thought and statement, and attends to fair play in discussion, argument, counselling, and drafting.
     2. Specific needed items of knowledge and skill:
        - a. Familiarity with the materials in a modern Contracts course book,
        - b. An ability to interpret precedent broadly or narrowly,
        - c. An understanding of the influence of situation-sense and reason in distinguishing, extending, following, limiting, or overruling precedents, and the rules for which they stand, and
        - d. The skill to argue both sides in a leeway situation while generating a drive to reach the best solution.
   - B. Develop hypotheses as to the students' present level of knowledge and skill, and existing or possible blocks to the development of that ability.
     1. So teach the students that they know when they have done an intelligent job right and well, and they take pleasure in it.
     2. Be on guard against anxiety and punishment in case-method instruction that can destroy or postpone self-confidence, hurt originality, and tend to standardize student views.
   - C. Determine promising learning sequences and hypotheses on how rapidly students can be expected to acquire new behavior.

one system can define all teachers' approaches to skills training. This is principally so for two reasons. First, the substantive content of different courses—particularly first year courses—necessarily dictates, at least to some extent, the skills teachers must emphasize in those courses. For example, teachers might heavily stress historical analysis skills in property courses, and almost completely ignore these skills in criminal law courses. Economic analysis could play a major role in contracts and torts courses, and remain in the background in procedure courses. Second, different teachers will quite often disagree on which skills to teach. Some contracts teachers, for example, might believe that the extreme flexibility of the substantive law in that field serves as a perfect vehicle for stressing advocacy skills. Others, however, repelled by a concentration on advocacy, might prefer to develop students' analytical skills regarding underlying political or economic values in this country's commercial laws.[8] Using this skills

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1. A general sequence for class learning: encourage students with respect to what they know and have learned; create doubt on some matter; then resolve that doubt or break it into the ingredients of an answer.
2. One very helpful device for creating and resolving doubt is to state hypotheticals or give professional skill variations such as challenging the students to draft a document that will restructure a transaction to change the way in which law applies to it.
3. The effect of a sequence can be strengthened by asking questions which provide answers that can be used as part of the data to be manipulated in answering later, more complex questions.
4. Assume that by and large students can do incredibly better than they think they can. Almost all can do the work of genius now and then.

Kelso, *Teaching Teachers: A Reminiscence of the 1971 AALS Law Teachers Clinic and a Tribute to Harry W. Jones*, 24 J. LEGAL EDUC. 606, 607-08 (1972).

8. In one sense, the John Marshall Law School, at which I teach, implemented this idea in 1983 when it completely revised its basic curriculum. One of the major changes involved a reemphasized focus on skills. The new catalogue description of the "core courses" at John Marshall contains skills language that sets up the individual course descriptions appearing later in the catalogue:

> The initial program for both the day and evening divisions consists of a core curriculum. In addition, all students must participate for four semesters in the "Lawyering Skills" program. This program, taught in small groups, focuses on legal writing, research and oral advocacy.
>
> All core courses develop basic lawyering skills and provide students with a fundamental store of knowledge about substantive legal concepts and rules. The skills include analysis of cases, statutes and other sources of law; recognition of relevant facts from a mass of raw data; effective oral and written communication; advocacy; and organization and management of legal work and ideas.
>
> The store of knowledge consists of that core of information that all lawyers must possess and that all students must obtain before they can progress to the second and third years of legal education.

THE JOHN MARSHALL LAW SCHOOL, 1984-85 BULLETIN 46. Individual course descriptions

paper as a "model," and not as an authoritative description of the one

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of the "core courses" now contain skills language, and emphasize the different skills taught in the various courses. For example, the catalogue provides this definition of Contracts I and II:

> An analysis of the formation, transfer and termination of contract rights and duties of parties to the contract, and the legal and equitable remedies available upon breach of contract. In addition to common law development, the law of sales under the Uniform Commercial Code is also examined, with major emphasis being placed on comparison of techniques for dealing with statutory or common law authority.

Id. at 52. The description of the course in criminal law begins with these sentences: "A course in the substantive law of crimes. Principal emphasis in the course is placed on studying the sources and meanings of statutes." *Id.* The course descriptions of torts and property make specific reference to developing the skill of "case analysis." *Id.* at 57, 59.

Related to the idea of different courses emphasizing different skills is the idea that different skills should be taught in each year of law school. What may be appropriate in first year courses, may not be adequate in upper division courses. The revised curriculum at The John Marshall Law School closely tracks this idea. The Law School's catalogue shows how different skills can be addressed in the upper division courses.

> DISTRIBUTION REQUIREMENTS
>
> All law students must be exposed to three crucial topics: the impact of non-legal ideas on the law and on the role of lawyers; the impact of governmental regulation on private business and personal transactions; and the role of formal dispute resolution in the legal process. Because exposure to these three critical topics is so important, all students must complete three "Distribution Requirements". The three are "Perspectives on the Law", "Government Regulation and the Law", and "The Process of the Law".
>
> 1. PERSPECTIVES ON THE LAW
>
> When attempting to help people solve exceptionally difficult or controversial legal disputes—disputes lawyers call "hard cases"—judges, legislators, lawyers and government officials must deal with materials and ideas other than those generally looked to by the legal community for guidance. That is so because cases, statutes, constitutions and regulations, the normal tools lawyers use, very often do not address the fundamental societal or personal conflicts that lie hidden beneath the surface of "hard cases".
>
> The faculty of The John Marshall Law School believes that all students must be exposed to the existence of these "non-legal" materials and ideas and must develop some understanding of how these materials and ideas are used to resolve particularly difficult disputes. Therefore, to satisfy the "Perspectives on the Law" requirement, STUDENTS ARE REQUIRED TO TAKE AT LEAST ONE OF THE COURSES LISTED BELOW, or such other courses as the faculty from time to time deems appropriate. . . .
>
> 2. GOVERNMENT REGULATION AND THE LAW
>
> Traditionally, American legal education has had a strong "private" law bias. That bias has generated two serious problems. First, it caused legal education to focus on methods people and businesses *themselves* used to resolve legal disputes, which focus was appropriate only until the arrival of the modern era of pervasive government regulation of private transactions and activities. At the present time, a very large part of many lawyers' work involves the continuing relationships that exist between governmental regulatory agencies and individual people and businesses. Therefore, the focus of legal education must change somewhat. Second, the private law bias has caused legal education to focus on the "common law", i.e., judge-made law. At the present time, however, "statutory law", i.e., law created by legislative

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and only appropriate skills training method, responds to both of these problems. Different teachers can prepare different skills papers.

The "model" idea also explains two other aspects of the paper. First, readers will note that the tone of the discussion attempts to make difficult ideas about skills training accessible to people not experienced in the intricacies of legal education. Simplification, rather than complication, pervades. For example, the description of the skill of "synthesis," although building heavily upon the writing of other legal educators, consciously avoids the complex analysis found elsewhere. This approach is similar to Professor Karl Llewellyn's masterful book, *The Bramble Bush*, which he wrote primarily for students. In a sense, this paper is modeled on it. Second, this paper repeatedly uses examples based on cases and materials contained in one specific contracts casebook.[9] The examples are representative,

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and administrative bodies, plays an extraordinarily large role in all lawyers' work.

The faculty of The John Marshall Law School believes that all students must carefully study the ongoing relationship that exists between governmental regulatory agencies and people and business, and must study that relationship in the context of statutes and cases dealing with, among other things, that relationship. Therefore, to satisfy the "Governmental Regulation and the Law" requirement, STUDENTS MUST TAKE AT LEAST ONE OF THE COURSES LISTED BELOW, or such other courses as the faculty from time to time deems appropriate. . . .

3. THE PROCESS OF THE LAW

Courts resolve only a small portion of legal disputes. Counselling leads to resolution. Negotiations lead to settlements. Arbitration permits people to present their disputes for resolution, not before judges, whose principal knowledge is of the law, but before people whose principal knowledge is of the type of transaction or activity involved. In addition, government administrative agencies or officers every year adjudicate far more disputes than courts do. And legislative hearings, rather than court proceedings, often provide the forum in which large groups of people attempt to resolve their most fundamental political, social and economic disputes. The faculty of The John Marshall Law School believes that all students should have some familiarity with the process of non-court dispute resolution.

Notwithstanding the fact that trials resolve only a small portion of all legal disputes, all legal disputes indeed may lead to such proceedings. Trials usually are the final resort. In addition, all careful lawyers must anticipate that their clients may be subjected to trials. All planning, counselling and negotiating, therefore, must anticipate such a turn of events. Furthermore, even though this perception is faulty, most people in this society view trials as the principal forum for lawyers. And although people with many different kinds of jobs and skills can assist in non-trial dispute resolution, only lawyers can try cases. Because of those facts, the faculty of The John Marshall Law School believes that all students at this law school must have a basic understanding of how trials work.

THE JOHN MARSHALL LAW SCHOOL, 1984-85 BULLETIN 46-47.

9. E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS (3d. ed. 1980).

not authoritative. They attempt to show how individual teachers using individual books can mine those books for individual skills training exercises.

To be sure, this paper has other uses than as a model. Throughout the text and notes, extensive quotation reflects the analysis that many legal educators have applied over the years to the topic of skills training. Mere collection of this source material has value to busy teachers. Furthermore, some teachers may well conclude that this paper itself might be useful to students, particularly in courses not revolving around particular substantive fields of law. For example, teachers participating in extended "orientation" programs for new law students or teaching first year "methods" courses might find that their students could learn from this approach. Likewise, teachers involved in special admission programs, such as that established for minority students by the Council on Legal Education Opportunity, might find that the systematic approach to skills training provided herein gives their students a coherent starting point. Finally, teachers of advanced writing or appellate advocacy courses might consider distributing this paper to their students. Its approach to organizing complex legal arguments could well help those advanced students.

One last introductory point is necessary. The method described herein concentrates quite heavily on developing advocacy skills. It does that for a straightforward reason. Professor Anthony Kronman of Yale University recently put the point quite bluntly:

> Today, as sixty years ago, the most important skill the law teacher imparts is the skill of advocacy, the ability to construct and defend a convincing legal argument. Before the law student can find any other analytic techniques professionally useful, he must have mastered the ability to make a legal argument—he must know how to build an argument from legal materials, such as cases, statutes, administrative orders, and the provisions of the Constitution, in accordance with the established, if not always precise, rules that determine how these materials are to be used, such as the rule of *stare decisis* coupled with the techniques for construing a judicial opinion in either an expansive or a restrictive way. The other techniques taught in law school can supplement this most basic skill, but despite the enormous curricular changes of the last sixty years, the skill of advocacy remains the cornerstone of all law-school instruction.[10]

No one familiar with Professor Kronman's writing, or with the approach to legal education of the Yale Law School, could accuse

10. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 959 (1981).

either of being excessively pragmatic or practical. And yet he calls advocacy the most important skill law teachers impart.[11] To be sure,

11. Many experienced teachers have criticized this advocacy orientation. Professor Dutile, arguing against the traditional case method system, said it is "totally" litigation-oriented. Dutile, *Introduction: The Problem of Teaching Lawyer Competency*, in LEGAL EDUCATION AND LAWYER COMPETENCY 3 (F. Dutile ed. 1981). Professor Thurman Arnold also bitterly attacked the adversary method of arriving at truth and the law school emphasis on it:

> Mutual exaggeration is supposed to create lack of exaggeration. Bitter partizanship [sic] in opposite directions is supposed to bring out the truth. Of course no rational human being would apply such a theory to his own affairs nor to other departments of the government. It has never been supposed that bitter and partizan [sic] lobbying assisted legislative bodies in their lawmaking. No investigation is conducted by hiring persons to argue opposite sides. The common law is neither clear, sound, nor even capable of being restated in areas where the results of cases are being most bitterly contested. . . .[M]utual exaggeration of opposing claims negative[s] the whole theory of rational, scientific investigation. Yet in spite of this most obvious fact, the ordinary teacher of law will insist (1) that combat makes for clarity, (2) that heated arguments bring out the truth, and (3) that anyone who doesn't believe this is a loose thinker. The explanation of this attitude lies in the realm of social anthropology.

Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 922 (1934) (footnote omitted). Professor Cahn reflects negatively on what he calls the "adversary distortion" in legal education. Cahn, *Some Reflections on the Aims of Legal Education*, 11 J. LEGAL EDUC. 1, 4 (1958). *See* Schwartz, *How Can Legal Education Respond to Changes in the Legal Profession?*, 53 N.Y.U. L. REV. 440, 444-47 (1978). Professor Himmelstein describes another danger in adversary training. "Some lawyers may be so locked into the adversary stance that they fail to consider an accommodation or compromise even when such a settlement would benefit both client and adversary. On the other hand, some lawyers so shy away from conflict that they may be too willing to compromise a client's claims." Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514, 529 (1978) (footnote omitted).

Other writers have argued, in a somewhat different context, that legal education should infuse students with a moral perspective of the law. Emphasis on advocacy training, they suggest, impedes this process. Professor Beveridge, while relating the experience of arguing a difficult point in court, graphically made this point:

> It is said that burglary exercises such a fascination that, once the delirium of its danger is tasted, a man can never put that fatal wine away. An old and distinguished lawyer once told me that one of the most brilliant young lawyers he ever knew said to him, at the conclusion of a legal duel in which he had resorted to the sharpest practice and won, "That was the most delicious experience of my life."

Beveridge, *The Young Lawyer and His Beginnings*, in STUDYING LAW 17, 20 (A. Vanderbilt ed. 1945); *see also* E. LEVI, FOUR TALKS ON LEGAL EDUCATION 22-23 (1952) (manipulation of law without relevance to justice); Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes and Values of Law Students*, 44 TENN. L. REV. 85, 92 (1976) (entrepreneurial values and a lawyer's limited focus on the client's momentary interests); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 104 (1968) (the nature of a lawyer's role); Weinstein, *The Integration of Intellect and Feeling in the Study of Law*, 32 J. LEGAL EDUC. 87, 89-93 (1982) (the professional image and code of ethics); White, *The Ethics of Argument: Plato's* Gorgias *and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 895 (1983) (fundamental human questions have special force and clarity for lawyers);

other teachers take different approaches to skills training. Neverthe-

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Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 690-91 (1968) (the effect of secularization of law upon legal education). *See generally* G. HAZARD & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 109-246 (1985); *Ethics in Academia: Power and Responsibility in Legal Education*, 34 J. LEGAL EDUC. 155-228 (1984).

I am aware of moral dilemmas that arise in connection with teaching skills courses. Professor Hegland states the problem bluntly: "[A]m I simply teaching paid assassins to aim better?" Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69, 69 (1982); *see* Vernon, *Education for Proficiency: The Continuum*, 33 J. LEGAL EDUC. 559, 565-67 (1983). A method for teaching legal analysis skills in substantive first year courses necessarily, therefore, raises questions about moral dilemmas. *See* Tuoni, *Teaching Ethical Considerations in the Clinical Setting: Professional, Personal and Systemic*, 52 U. COLO. L. REV. 409 (1981); Willging & Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306 (1982). Professor Luban addresses a related point when he describes a method for dealing with moral or ethical issues in the context of a typical "case method" course. Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 638-41 (1983).

A number of writers, however, seem to favor an emphasis on advocacy, at least in connection with some courses. Dean Vanderbilt says a student who has missed the "clash of conflicting decisions in classroom discussion has missed much of the zest of legal education." Vanderbilt, *Foreword*, 30 IOWA L. REV. 325, 331 (1945). This seems to bespeak an advocacy idea.

Professor Llewellyn stresses advocacy as the heart of his definition of a lawyer's job: "[T]he devising of a way out, within the existing framework (plus existing leeways) of accepted relations . . . ." Llewellyn, *Lawyer's Ways and Means, and the Law Curriculum*, 30 IOWA L. REV. 333, 337 (1945). Dean Green argues that training in advocacy is one of the most important merits of case study. Green, *Advocacy and Case Study*, 4 J. LEGAL EDUC. 317 (1952). Dean Knickerbocker presumably would argue that any attempt to reduce the adversary component in legal education is destined for failure:

> It is clear that law attracts those who like orderly controversy, who accept gladly the idea that there are two sides to every question and that the essence of their careers will be battle. Argument is no part of a physician's business. Ministers do a great deal of arguing, but their invisible opponent is not invited to reply. Scholars occasionally bicker among themselves, but theirs is essentially a quiet, unopposed life. Engineers know that things work or do not work. No trouble there. Industrialists, businessmen, musicians, artists—none of these rests his career on controversy. Nearest to the lawyer in this basic characteristic is the politician; but the controversies he becomes involved in are rarely orderly, and the rules are notoriously lax. Nevertheless, it is little wonder that many lawyers enter politics as a natural turn to their careers.
>
> The crucial questions to the potential prelaw student, then, may be: "Do you enjoy a well-regulated fight?" And second, "Are you willing to train for a long series of such fights and to learn the intricate rules of the game?" If to both questions, the answer is an eager yes, a reasonably good prospect for law college stands revealed.

Knickerbocker, *Talents for the Study of Law*, 12 J. LEGAL EDUC. 532, 540 (1960).

Several writers have suggested that moral training should follow skills training. Their reasoning seems to be that it is better to discuss moral conventions with people who possess the ability to violate these conventions. For example, it is pointless to talk of the possible immorality of nonmarital sexual intercourse with six-year olds. Sixteen is a better age for that. The same is true, in a sense, of law students. Until they possess the skills necessary to violate professional mores, discussion of morality in this context seems pointless. Professor Llewellyn succinctly stated the idea: "Technique without ideals may be a menace, but ideals without

less, no one can dispute the legitimacy of the technique described herein.

II. "THINKING LIKE A LAWYER"

> I want you to begin this course, then, by trying to imagine as fully as possible how it might be said that law is not a science—at least not the "social science" some would call it—but an art. And

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technique are a mess." Lesnick, *Preface*, 53 N.Y.U. L. REV. 293, 294 (1978) (quoting Professor Llewellyn). In another work, Professor Llewellyn makes a similar point, but this time in a sports analogy. "The man who sees line-play in the football game is the man who once tried playing on the line himself." K. LLEWELLYN, THE BRAMBLE BUSH 53 (1960). Professor Morris provides a different reason, and a troubling one, for being wary of teaching morality in classrooms, in any year of law school:

> Students enroll in law schools to learn the law, and there is no way to accomplish that end without dealing with their cognitive faculties. Students accept exposure of their thinking process when they enroll in law school. Although there is always a touch of arrogance when one person coerces another to reveal something about himself, there is less arrogance, and it is more justifiable, I believe, when a person is asked to expose some of his cognitive faculties rather than his inner self, inextricably bound up as it is with his entire personal life.
>
> This latter kind of exposure is envisioned by proponents of the second view of the "more compleat lawyer" -school of legal education. It involves exposure of the student's psyche—his very being. Exposure of this kind should not be undertaken except on unimpeachable educational grounds. If this second approach were followed, the anxieties produced by law school would not be the only psychic materials laid bare in the sensitivity sessions conducted by a law professor that this approach requires. The anxieties created by students' personal lives would also come tumbling out. Would we be justified on sound educational grounds in eliciting such information? I think not.

Morris, *Legal Education: Cognitive Development or Psychological Adjustment?*, 53 N.Y.U. L. REV. 635, 641-42 (1978).

There is another reason for adopting a teaching method in the first year that focuses heavily on advocacy or adversary skills. An introduction is necessary. Many lawyers, teachers, and judges have attempted to resolve the conflict between the practice of advocacy skills and moral or public responsibilities. Presumably most legal educators have struggled with this problem. Few teachers will ever be satisfied that they have made a correct decision in this area. Attempting to resolve the dilemma, however, may paralyze legal educators in their teaching. They cannot decide what to do, which way to go, what method of teaching to use. They want a foot in both camps. They want to stress moral and public responsibility, yet help students learn advocacy. Because legal educators cannot decide what to do among themselves, they succeed only in causing students to acquire neither perspective. It might be better to choose one approach, acknowledge that the choice might be wrong, and then heavily concentrate on it. In another course—possibly an upper class elective—the teacher could use the other approach. This is the approach I take. In my contracts courses, I place great emphasis on advocacy. In my upper division course, professional responsibility, I spend the entire term "trashing" the adversary system and the role of advocates in it.

Professor Bergin has hinted at a related idea. He suggests that students, after the first year, take one of two tracks in law school—a "practice" track or a "policy" track. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 652-53 (1968). In this scheme, teachers in the different tracks could take completely different approaches to issues of morality.

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> this course is directed to you as an artist. There is no body of rules expressing the art of the lawyer any more than that of the sculptor or painter. You are as free as they, and as responsible for what you do. It is true that one of the mediums of the lawyer's art is rules, and the lawyer must know rules, and the other materials of the law, as the sculptor must know clay and the painter paint and canvas. You must know what they are and how they work, before you can work with them. But what you must ultimately learn is what to do with rules and judicial opinions and all the other forms of expression that are the working stuff of a lawyer's life, just as the sculptor must learn what to do with clay and marble. You may feel that you are constrained by your material, as indeed you are. But compare the pianist, who is told what notes to play, in what order, how long and how loud; yet art is surely possible there. In asking you to define for the moment the lawyer as writer, to regard yourself in that way, I am asking you not to follow direction and example but to trust and follow your own curiosity; to work out in your imagination various future possibilities for yourself, defined by the real and imagined performances of your mind at its best; and to subject what you discover to criticism and speculation.[12]

All academic disciplines teach students to think. Legal education, however, supposedly does more. It teaches students to "think like lawyers."[13] What a strange slogan. "Think like a lawyer." It seems obvious that mere differences in substantive knowledge between lawyers and doctors, engineers, or scientists cannot justify the existence of the "think like a lawyer" phrase. Different kinds of professional people, of necessity, possess different kinds of knowledge. But doctors do not talk about "thinking like a doctor." What, then, explains the phrase's existence? Perhaps lawyers merely tower over all others in insecurity, unable to accept that thinking is thinking, period, and that what lawyers do really does not differ significantly from what other highly educated people do.[14] Perhaps lawyers simply chant their cryptic incantation hoping to frighten away outsiders.[15]

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12. J. WHITE, THE LEGAL IMAGINATION xxiv-xxxv (1973).

13. Some disagree. Dean Sandalow noted this when he commented that it is "no longer very fashionable" to teach students to think like lawyers. Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 170 (1984).

14. Dean Mudd argues that the focus in law school should shift from thinking like a lawyer to "thinking clearly and precisely." Mudd, *Thinking Critically About "Thinking Like a Lawyer,"* 33 J. LEGAL EDUC. 704, 706 (1983). He suggests that lawyers do not think in patterns different from those of other people. *Id.* at 706-07.

15. Other commentators have made this point before. Although not directly speaking of the phrase "thinking like a lawyer," Judge Frank talks about legal education as "magical incantations to prevent law students from observing what goes on in the legal cosmos." Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1344 (1947). Dean Carrington, comparing Mark Twain's description of cub pilot training to law student training, describes a "mystic

An alternate explanation, however, arguably comes closer to truth. Maybe lawyers do think differently. Maybe they do not look at things, events, and people as others do. Maybe they do not think in patterns used by other educated people.[16]

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language that excluded laymen from understanding." Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 223 (1984); *see* Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 691-92 (1968). Professor Hornstein considers the phrase "thinking like a lawyer" to be a "bromide of contemporary legal educators." Hornstein, *The Myth of Legal Reasoning*, 40 MD. L. REV. 338, 338 (1981). He argues that "legal reasoning is nothing more than reasoning—purposive problem solving—about legal materials." *Id.* at 339. Professor Fuller makes an interesting analogy in this context when he says that "methodism" can be carried to excess. "There is need to recall," he says, "that the slogan, 'We teach men to think,' has been the last refuge of every dying discipline from Latin and Greek to Mechanical Drawing and Common-Law Pleading." Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 189, 190 (1948).

16. Unfortunately, most written work on legal education contains little or no attempt to define the skill of legal analysis. For example, one landmark analysis of skills training in law school discusses the skill of "legal thinking", or "legal method", but then does not systematically describe what it is. ASSOCIATION OF AMERICAN LAW SCHOOLS, REPORT OF COMMITTEE ON CURRICULUM, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 351 (1945).

A few writers, however, have attempted to define the components of legal analysis. These few attempts provide valuable insights. Dean Bayless Manning's definition of analytic skills follows:

> By analytic skills, I refer to those special capacities of the lawyer to distinguish A from B, to separate the relevant from the irrelevant, to sort out a tangle into manageable sub-components, to examine a problem at will from close range or long distance, and to surround a problem, surveying it from many different perspectives.

H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 22 (1972). Professor Leflar provides a different list of skills that professors should teach in first year courses. His second point is particularly relevant to this paper:

> (1) Understanding of the fundamental rules, principles, policies and organization that make up our legal system as a whole,
> (2) Mastery of techniques for study and analysis of narrow problems in minute detail,
> (3) Appreciation of the law's relation to our society—past, present and future, and
> (4) An interest in the law sufficient to induce him to spend the rest of his life trying to learn something about it.

Leflar, *Legal Education: The Making of a Good Law School*, 20 ARK. L. REV. 50, 52-53 (1966) (footnote omitted).

Other writers have formulated similar lists. Professor Casner considered the components of legal analysis to be these: "examining a problem, determining the relevant factors in relation to the solution, formulating a sensible judgment in the light of those factors, and expressing . . . conclusions in clear and understandable language." Casner, *What Makes a Law School Great?*, 1956 U. ILL. L.F. 270, 274. Professor Morgan, describing the objectives of legal education, provides a more expansive list than does Professor Casner. Professor Morgan claims that lawyers need the following skills:

> a capacity to think hard and straight, a settled determination to accept the *ipse dixit* of no man or group of men, the ability to make a searching analysis of a complicated state of facts which will disclose the legal problem involved therein, a resourceful imagination to discover possible solutions, the patience to investi-

If this is true, however, then other questions arise. How do lawyers

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gate their validity and practicability, and the courage to form and act upon his own considered judgment. Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379, 391 (1952). Arguing against the overemphasis law schools place on skills training, particularly "practical" skills, Professor Fuller provides an excellent list of intellectual skills. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 189, 191 (1948). His list parallels my more concrete list of six skills. *See infra* note 18 and accompanying text. Professor Fuller's list includes the skills of reasoning logically, rejecting irrelevancies, detecting unstated premises, reading and listening with understanding, arguing persuasively, fathoming motives, and writing and speaking good English. Fuller, *supra*, at 191. Although he believes the list could be "expanded indefinitely", I think his list alone provides a valuable set of goals.

Dean Sandalow defines legal analysis as "[t]he abilities to read imaginatively and with attention to the subtleties of language, to frame and test suitable hypotheses for synthesis, and to detect premises of thought and errors of logic." Sandalow, *The Moral Responsibility of Law School*, 34 J. LEGAL EDUC. 163, 171 (1984). Professor Duncan Kennedy, in a typically iconoclastic article, describes the components of legal analysis in the following vague terminology:

> Law students sometimes speak as though they learned nothing in school. In fact, they learn skills, to do a list of simple but important things. They learn to retain large numbers of rules organized into categorical systems (e.g., requisites for contract, rules about breach). They learn "issue spotting," which means identifying the ways in which the rules are ambiguous, in conflict, or have a gap when applied to particular fact situations. They learn elementary case analysis, meaning the art of generating broad holdings for cases, so they will apply beyond their intuitive scope, and narrow holdings for cases, so that they won't apply where it at first seemed they would. And they learn a list of balanced, formulaic, pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation in spite of a gap, conflict, or ambiguity or that a given case should be extended or narrowed. These are arguments like "the need for certainty" and "the need for flexibility," "the need to promote competition" and the "need to encourage production by letting producers keep the rewards of their labor."

Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 595 (1982), *reprinted with minor revisions in* D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 15 (1983). After outlining these skills, Professor Kennedy states that law schools generally teach these skills in a way that "almost completely mystifies them for almost all law students." *Id.* at 596.

A few writers have made elaborate efforts to define the components of legal analysis. For example, Professors Cort and Sammons provide a much more complex breakdown of the components of legal analysis than I do:

> III. LEGAL ANALYSIS COMPETENCY
>
> *General Definition*: The ability to combine law and facts in a given situation to generate, justify, and assess the relative merits of alternative legal positions.
>
> *Legal Analysis:*
> *Analyzing Facts and Identifying Relevant Law*
>
> A. *Analyzing Facts and Identifying Relevant Law*—Given a fact situation and knowledge of rules of law, ability to identify relationships between facts and law in a way that will facilitate the formulation of alternative legal theories.

think? In what patterns do lawyers alone think? What are the com-

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Specific Competencies:

(Analysis of Facts)

1. Ability to identify relevant facts.
2. Ability to identify the inconsistencies among facts.
3. Ability to identify the reliability of asserted facts.
4. Ability to distinguish facts from conclusions of law (Identification of Relevant Law).
5. Ability to determine rules of law relevant to framing legal issues (*e.g.*, statutes, regulations, case law, court rules, secondary authorities).
6. Ability to formulate legal rules appropriately or correctly.
7. Ability to determine trends in interpretation or application of laws.
8. Ability to identify discrete legal issues.

Note: For the specific competencies in this sub-part of legal analysis, and in subsequent sub-parts of legal analysis, a particular *sequence* or *process* of steps is not implied. A model was followed in deriving elements (specific competencies) listed here. Other models should, in one form or sequence of another, involve the same elements. Thus, these elements should be adaptable to various styles of legal analysis. Readers will also note that some specific competencies may overlap. This is probably inevitable, although we do not believe there are complete redundancies. It is believed that differences in seemingly similar specific competencies will aid in diagnosis of legal analysis problems.

Legal Analysis: Formulating Legal Theories

B. *Formulating Legal Theories*—Given facts analysis, the law, and the resulting identification of legal issues, the ability to identify and organize arguments and counter-arguments in terms of claims, defenses, or other legal results.

Specific Competencies:

1. Ability to group and categorize facts in terms of the concepts or language of the law.
2. Ability to select aspects of the facts which appear to call for the application or non-application of a legal rule or concept.
3. Ability to select aspects of a legal rule or concept which appear to call for its application or non-application to the facts.
4. Ability to show why some application of a legal rule or concept calls for an extension, limitation, or rejection of another rule or concept.
5. Ability to separate, combine and sequence arguments to formulate a legal theory.
6. Ability to sequence a complete range of legal theories in accordance with some systematic ordering principle.

Legal Analysis: Evaluating Legal Theories

C. *Evaluating Legal Theories*—Given a legal theory or alternative legal theories, the ability to predict the decision of an authoritative source.

Specific Competencies:

1. Ability to identify the predisposition of a particular decision-maker or class of decision-makers (*e.g.*, characteristics of the decision-

ponent parts of "thinking like a lawyer"? The author suggests that

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maker, workings of the decision-maker's institution, patterns of previous decisions, reasons given for previous decisions).

2. Ability to identify compelling equities recognized by the law or inherent in the fact situation.
3. Ability to determine relative effectiveness of a legal theory or of alternative legal theories by analysis and evaluation of 1 and 2 (above).

Cort & Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397, 440-41 (1980).

Dean Christenson's list of six skills also describes the components of legal analysis. Christenson, *Studying Law as the Possibility of Principled Action*, 50 DEN. L. J. 413, 430 (1974). He claims that the six basic skills are "(1) analysis, (2) criticism, (3) creativity, (4) artistry or craft, (5) restraint, and (6) systematic comprehension." *Id.* Dean Christenson then describes an elaborate list of "intellectual traits" proposed by Professor Freund:

a. *Dialectic thinking* about two conflicting principles and the art of getting inside the conflict.
b. *Contextual thinking* which requires asking what one means by a question.
c. *Ethical thinking* about the meaning of just expectations through concepts such as the law of contracts and public policy.
d. *Genetic thinking* about how the law responds to change in the modes of production and distribution, labor, "progress," and negligence, and to the changing patterns of life.
e. *Associative thinking* by metaphor and adaptive or assimilative processes using concepts and legal fictions, with the aim of categorizing ideal types in order to assimilate change and continuity.
f. *Institutional thinking* about the central position of a procedural framework and the interrelation of ends and means, such as in negotiating and drafting contracts, which can serve in illuminating international disputes and constitution-making.
g. *Self-critical thinking* by abandoning the old in favor of a fresh formulation, or by preferring change over continuity by a process of overruling, deciding whether to continue the process of assimilation or to abandon precedent.

Id. at 432 (quoting P. Freund, *The Law and the Schools*, in ON LAW AND JUSTICE 108, 110-15 (1968)).

Professor Holmes distinguishes between "theoretical" skills and "applied" skills. Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 577 (1976). Professor Holmes concludes with an extraordinarily complex "Index of Component Lawyering Skills." *Id.* at 578-80 app. Part III of that index, "Legal Dialectics," describes some of the skills outlined in this paper:

A. *Fact Sensitivity*. This includes the habit of approaching problems through the facts and the ability to ferret out and marshal the "unique facts" of a particular situation. It embraces an understanding that rules of law are factual in character, consisting of a statement of "type-facts" with a subsequent statement of official consequences.

B. *Legal Reading*. This is an elementary capacity for the perceptive and retentive reading of legal materials, characterized by the habits of concentration, comprehension and understanding. Careful reading precedes accurate analysis and synthesis.

C. *Legal Analysis*. Legal analysis, like legal synthesis, is a dialectical skill based on Aristotelian logical applications and might be more properly

the phrase "thinking like a lawyer" means mastering six distinct and

termed "legal logic" as contrasted with formal logic. It is composed of the ability to analyze cases and statutes.

D. *Legal Synthesis.* This is a dialectical, reasoning skill applicable to judicial and administrative opinions and to statutory materials. It involves the ability to combine those rules or interpretations acquired by legal analysis into a complex whole. Law is understood to be the formulation that results when the "unique facts" of specific situations are generalized into "type facts" and then into a rule. This dialectical process concerns classification and generalization but not particularization. As a consequence, it does not use applied analytical skill. When a principle is applied to a particular problem, the unique facts of that problem must be converted to type facts which can be matched with the type facts of the principle already formed by analysis and synthesis. It is in particularization that applied analytical training has the merit of forging intellectual (theoretical) skills taught by the case method.

Id. at 579 app.

Professor Strong also provides an elaborate list of the components of "legal skills":

C. LEGAL SKILLS

1. Dialectical
   a. *Fact Discrimination*
      Objective—to develop analytical capacity to discriminate in terms of legal relevance, probative value, and persuasiveness.
   b. *Case Analysis*
      Objective—to develop analytical capacity for finding the *ratio decidendi* and the principle of judicial and administrative decisions.
   c. *Statute Analysis*
      Objective—to develop analytical capacity for the technical interpretation of legislation promulgated by legislative assemblies and administrative agencies.
   d. *Legal Synthesis*
      Objective—to develop capacity for systematic formulation of legal principles and concepts, and for distinguishing and reconciling statutes and decisions.
   e. *Issue Analysis*
      Objective—to develop diagnostic capacity for the identification and classification of legal issues in raw fact patterns.
   f. *Issue Disposition*
      Objective—to develop capacity for discriminating application of legal principles and concepts to the resolution of legal issues.
2. Technical
   a. *Legal Advocacy: Adjective*
      Objective—to develop technical capacity for competent presentation of issues before legislative and adjudicative bodies.
   b. *Legal Advocacy: Argumentative*
      Objective—to develop capacity for persuasive argumentation of issues before legislative and adjudicatory bodies.
   c. *Legal Draftsmanship*
      Objective—to develop technical capacity for the competent drawing of representative private law and public law documents.
   d. *Legal Research*
      Objective—to develop capacity for effective use of legal and related materials.

specifically definable skills. These skills are different from those possessed by nonlawyers, perhaps even different from those possessed by normal human beings.[17] The six skills revolve around the use of facts,

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e. *Legal Writing*
Objective—to develop capacity in preparing effective written legal memoranda and commentary.

Strong, *A New Curriculum for the College of Law of The Ohio State University*, 11 OHIO ST. L.J. 44, 47 (1950).

Several other writers have also provided useful and thought provoking definitions of legal analysis. These descriptions, however, are too complex and lengthy to be quoted herein. *See* Crombag, Wijkerslooth, & Serooskerken, *On Solving Legal Problems*, 27 J. LEGAL EDUC. 168 (1975); Gross, *On Law School Training in Analytic Skill*, 25 J. LEGAL EDUC. 261 (1973). The extremely complex case analysis system of Dean Noble W. Lee also deserves study. Ingram, *Case Analysis Made Easy*, 30 J. LEGAL EDUC. 505 (1980). Two Rutgers professors have recently provided an extensive list of component skills in an article discussing a controversial "contorts" course given at that school. Feinman & Feldman, *Pedagogy & Politics*, 73 GEO. L.J. 875 (1985).

17. Although my comparison between law students and aliens is extensive, other legal educators have alluded to this transformation. Professor Llewellyn discusses the difficulties and dangers associated with turning "human beings into lawyers." K. LLEWELLYN, THE BRAMBLE BUSH 101 (1960). Professor Beale stated that teachers often flatter themselves into thinking they have prepared students to "make a noise like a lawyer." Hutchins, *The Autobiography of an Ex-Law Student*, 1 U. CHI. L. REV. 511, 515 (1934). Dean Sandalow also suggests alienness when he asks "what the implications might be if there were some opposition between the qualities required of lawyers and those that we seek to foster as human qualities." Sandalow, *The Moral Responsibilities of Law Schools*, 34 J. LEGAL EDUC. 163, 174 (1984). Professor Weinstein flatly states that "neglect of self and abrogation of one's personal values is an outgrowth of the process of learning the law; and that learning to 'talk like a lawyer' and 'think like a lawyer' may encourage some to forget that they are first and foremost human beings." Weinstein, *The Integration of Intellect and Feeling in the Study of Law*, 32 J. LEGAL EDUC. 87, 97 (1982). Professor Keeton discusses the "transforming" experience:

> The most compelling testimony of the value of law school courses that focus on skills training is the student evaluation that describes such a course as a transforming experience. The student emerges from the course with a sense of being a different person, performing in some typical role in a distinctively different way at the beginning and end of the course. When that sense has been developed in the student, very likely it will carry with it both an improved capacity to learn from the experience of the future and a strong inclination to use that capacity rather than allowing it to lie fallow.

Keeton, *Teaching and Testing for Competence in Law Schools*, 40 MD. L. REV. 203, 216 (1981).

Attorney and Clinical Psychologist Robert Redmount is very critical of the product that results from teaching students to think like lawyers. In effect he describes the creation of alien beings:

> Though one may accept that the process of cultivating "a developed capacity to think" is largely successful in "better" law schools, there are nevertheless some critical observations to be made. It is important to recognize that it is essentially only *one* style and habit of thinking that is developed, and, what is worse, it is implicitly deemed to be a sufficient method to attack all manner of problems and produce a sufficiently probative, cogent, and sensitive practical result. The system of legal decision making, especially the judicial process, is singlemindedly committed to it. Conant points out, in his discussion of two modes of thought, that any "one mode may be underdeveloped or overdeveloped;

statutes, synthesis, analogies, policy, and apparent contradiction.[18]

A. *The Skill Of Using Facts*

> The main part of intellectual education is not the acquisition of facts, but learning how to make facts live. The mark of a master is that facts, which before lay scattered in an inorganic mass, when he shoots through them the magnetic current of his thought, leap into an organic order and live and bear fruit.[19]

To use facts, lawyers must develop the ability to identify facts that may be advantageous to them in resolving a dispute and to

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if so, the balance will need redressing." Conant's credo is that "a free society requires today among its teachers, professors and practitioners two types of individuals: the one prefers the empirical-inductive method of inquiry: the other the theoretical-deductive outlook." He observes that "both modes of thought have their dangers; both have their advantages." He then concludes that "continuation of intellectual freedom requires a tolerance of the activities of the proponents of the one mode by the other." His distinction, to give an oversimplified example, is between the thinking of speculative or theorizing philosophers and that of empirical or practical scientists.

> The training of thinking in law school is pervasively a unidimensional process with fringe consideration of methods, other than the dialectical case method, of organizing and interpreting experience. It essentially fits and suits the operative juridical system though it may be prejudicial in the way it operates in other contexts, such as the law office practice. The thinking style is incisive but narrow. It encourages focused decision, but does not encourage open minded inquiry. It creates authority by expanding reason, but at the expense of narrowing the base of experience in order to produce conformity in analysis and decision making. It is inimical to dimensions of experience that are "unruly" or irrational, and hence can display no deference toward or consideration of emotional or partly formed experience. It is indifferent to moral expression. It cannot regard single or personal events with adequate individualized concern and consideration. It is, in sum, a sharply honed method that tends to characterize its practitioner, the lawyer, as a person with practiced technique in a certain style of analysis but not much else.

Redmount, *Law Learning, Teacher-Student Relations, and the Legal Profession*, 59 WASH. U.L.Q. 853, 871-72 (1981) (footnotes omitted).

In my contracts courses, I return repeatedly to variations on this theme of alienness. References to the *Star Trek* movies and television show, the *Star Wars* movies, and many other well-known and not so well-known outerspace movies abound. I get some of my biggest laughs throughout my courses by building on a comment that I first make early in the term to a student who is having particular difficulty dealing with me in class. I remind the student that Captain Kirk in *Star Trek*, when facing seemingly impossible odds on an alien planet, simply speaks into his radio communicator: "Beam me up, Scotty." I revisit this image and phrase again and again during the semester. My attempt to paint a picture of the alienness of lawyers seems to have some effect. My nickname is "Darth Wangerin."

18. My restrictive definition of "thinking like a lawyer" to skills of legal analysis is not unprecedented. *See, e.g.*, Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 984 app. (" 'think like a lawyer' (that is, the ability to read cases, handle legal doctrines, and employ the techniques of legal analysis)").

19. *Judge Holmes' Oration*, 3 LAW Q. REV. 118, 118 (1887).

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explain facts that may hurt their client's position.[20] In a work com-

20. Many writers have expressed the importance of learning how to work with facts. For example, Professor Keener, one of the early protagonists of the case method, and perhaps its greatest master, described it as the method that "best develops the power to analyze and to state clearly and concisely a complicated state of facts, a power which, in no small degree, distinguishes the good from the poor or indifferent lawyer." Keener, *The Inductive Method in Legal Education*, 17 A.B.A. REP. 473, 489 (1948). Professor Llewellyn places extraordinary importance on the study of facts in cases. *See, e.g.*, Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 792-93 (1941). Dean Levi agrees. "The ability to compare cases by contrasting fact situations is at the very heart of the lawyer's craft." E. LEVI, FOUR TALKS ON LEGAL EDUCATION 30 (1952). Professor Marx also emphasizes the importance of training students to work with facts. Marx, *Shall Law Schools Establish a Course on "Facts"?*, 22 U. CIN. L. REV. 281 (1953); *see* Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 238-42 (1950); Lucas, *On Not Worshipping Facts*, 8 PHIL. Q. 144, 144-48, 150, 152, 156 (1958), *reprinted in* W. BISHOP & C. STONE, LAW, LANGUAGE AND ETHICS 268-72 (1985); White, *The Study of Law as an Intellectual Activity*, 32 J. LEGAL EDUC. 1, 6-7 (1982). For another important discussion regarding facts, see Twining, *Taking Facts Seriously*, in ESSAYS ON LEGAL EDUCATION 51 (N. Gold ed. 1982).

Other writers on this subject agree. For example, Professor Martineau stated that "[t]he basic failing of recent developments in legal education is that they ignore a crucial point—abstract rules of law do not exist independently of the facts of a case." Martineau, *Legal Education and Training Artists of the Law* (Book Review), 57 N.Y.U. L. REV. 346, 351 (1982) (reviewing S. MENTSCHIKOFF & I. STOTZKY, THE THEORY AND CRAFT OF AMERICAN LAW (1981)). Professor Macdonald provides analysis, similar in concept to mine, of the importance in legal education of the study of facts:

> "Law and . . ." courses also highlight conflicting attitudes about the importance of facts in the legal system. A generation ago law teachers began to realize that, contrary to the ethereal assumptions of text and casebook compilers, apparently irrelevant facts do make a difference in the application of legal doctrine. Yet most teaching proceeds at such a high level of abstraction that these differences can be glossed over. "Law and . . ." courses deny the teacher this comfortable escape and eliminate his ascendency over students to the extent that it is based solely on his superior knowledge of legal doctrine. A significant consequence of "law and . . ." courses, therefore, is that professors and students are compelled to account for both the major and the minor premise in the legal syllogism. It is nothing to say to a client: "I am not sure if the judge will find for you, but if he does, there is an 80 percent chance that he will invoke the rule in X v. Y." It is quite another to state: "I am 80 percent certain that the judge will find for you, but the basis on which he will do so is unclear. There are a number of possibilities that occur to me." The former assertion flows from the standard law-school exercise of issue identification, which is the stock-in-trade of courses organized by legal concept; the latter focuses on the intelligent evaluation of facts, which is most often a "law and . . ." exercise.

Macdonald, *Curriculum Development in the 1980's: A Perspective*, 33 J. LEGAL EDUC. 569, 576 (1983); *see* F. ZEMANS & V. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 12-16, 123-31 (1981). Zemans and Rosenblum describe the practicing bar's view of the relative importance of selected skills and areas of knowledge. First in importance is fact gathering. Second is the "capacity to marshal facts and order them so that concepts can be applied. *Id.*

Some writers have argued that the case method of instruction does not equip students to work with facts. *See, e.g.*, A. HARNO, LEGAL EDUCATION IN THE UNITED STATES 152-53 (1953); E. LEVI, FOUR TALKS ON LEGAL EDUCATION 31 (1952). I disagree. Inventive use of the reported facts in casebooks and speculation about facts not reported give students an excellent introduction to the role of facts in legal disputes. In fact, a commonly criticized aspect of many casebooks, that the statements of facts are too condensed, can be a great tool for learn-

pleted shortly before his death, Professor Karl Llewellyn illustrated how to use facts to create sympathy for one's client.[21] Talking about and quoting from Justice Cardozo's classic New York Court of Appeals opinion in *Wood v. Lucy, Lady Duff Gordon*[22] he showed how lawyers can "use" facts. " 'The defendant styles herself'—now watch the way in which she is subtly made into a nasty person—'The defendant styles herself' a creator of fashions."[23] These words alone, according to Professor Llewellyn, demonstrate how a master advocate can turn the statement of facts into the "complete guts" of a case. He then continued his demonstration of how the statement of facts in *Lucy, Lady Duff Gordon* gradually built up sympathy for Wood.[24] Then, as soon as he finished illustrating how Cardozo used the facts to help generate sympathy for Wood, Professor Llewellyn turned the tables and provided a new statement of facts, a statement that clearly creates sympathy for Lucy:

> The plaintiff in this action rests his case upon his own carefully prepared form agreement, which has as its first essence his own omission of any expression whatsoever of any obligation of any kind on the part of this same plaintiff. We thus have the familiar situation of a venture in which one party, here the defendant, has an asset, with what is, in advance, of purely speculative value. The other party, the present plaintiff, who drew the agreement, is a marketer eager for profit, but chary of risk.[25]

This is use of the first skill at its best. Teachers should encourage students to begin working on the first skill very early in their studies. The best exercises, of course, involve cases in which a student can recast a court's own statement of facts, first to create sympathy for one side of the dispute, then to create sympathy for the other. Cases

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ing. The absence of specific facts creates a broad opportunity to speculate about the real facts in a dispute. Professor Stone recognized this in his handbook for law students. F. STONE, HANDBOOK OF LAW STUDY, 73-76 (1952). Dean Sandalow's comments on the value of appellate opinions in casebooks and their carefully selected facts indicate that he agrees with this view. Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 172 (1984). "A skillful teacher will lead students to read opinions imaginatively, with attention to the human possibilities that lie beneath their abstract language." *Id.* Returning to his moral responsibility theme, Sandalow concludes that "[t]he exploration of these possibilities, conjoined with consideration of their implications for judgment, offers opportunity for developing that fusion of feeling and intellect we call sensibility." *Id. See generally* Brown, *Teaching the Low Visible Decision Processes of the Lawyer*, 25 J. LEGAL EDUC. 386, 400 (1973) (developing listening skills and an ability to use "dynamic fact content"); Green, *Advocacy and Case Study*, 4 J. LEGAL EDUC. 317, 320 (1952) (fact evaluation may be the lawyer's highest art.).

21. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637-38 (1962).
22. Wood v. Lucy, Lady Duff Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).
23. Llewellyn, *supra* note 21, at 637-38.
24. *Id.*
25. *Id.* at 638.

with graphic facts seem to be the best vehicles for these initial exercises. Appearing quite early in Professors Farnsworth's and Young's popular contracts casebook[26] is the case of *Feige v. Boehm*.[27] It would be difficult to find a better vehicle for practicing the skill of using facts. The court states the facts as follows:

> Plaintiff, a typist, now over 35[sic] years old, who has been employed by the Government in Washington and Baltimore for over thirteen years, testified in the Court below that she had never been married, but that at about midnight on January 21, 1951, defendant, after taking her to a moving picture theater on York Road and then to a restaurant, had sexual intercourse with her in his automobile. She further testified that he agreed to pay all her medical and hospital expenses, to compensate her for loss of salary caused by the pregnancy and birth, and to pay her ten dollars per week for the support of the child upon condition that she would refrain from instituting bastardy proceedings against him. She further testified that between September 17, 1951, and May, 1953, defendant paid her a total of $480.
>
> Defendant admitted that he had taken plaintiff to restaurants, had danced with her several times, had taken her to Washington, and had brought her home in the country; but he asserted that he had never had sexual intercourse with her. He also claimed that he did not enter into any agreement with her. He admitted, however, that he had paid her a total of $480. His father also testified that he stated "that he did not want his mother to know, and if it were just kept quiet, kept principally away from his mother and the public and the courts, that he would take care of it."
>
> Defendant further testified that in May, 1953, he went to see plaintiff's physician to make inquiry about blood tests to show the paternity of the child; and that those tests were made and they indicated that it was not possible that he could have been the child's father. He then stopped making payments. Plaintiff thereupon filed a charge of bastardy with the State's Attorney.[28]

Earlier in the case, the court reported on the plaintiff's allegations, to which the defendant demurred. These allegations add more facts with which skilled lawyers could work:

> Plaintiff alleged in her declaration substantially as follows: (1) that early in 1951 defendant had sexual intercourse with her although she was unmarried, and as a result thereof she became pregnant, and defendant acknowledged that he was responsible for her pregnancy; (2) that on September 29, 1951, she gave birth to a

26. E. FARNSWORTH & W. YOUNG, *supra* note 4, at 52.
27. 210 Md. 352, 123 A.2d 316 (1956).
28. 210 Md. at 356-57, 123 A.2d at 319.

> female child; that defendant is the father of the child; and that he acknowledged on many occasions that he is its father; (3) that before the child was born, defendant agreed to pay all her medical and miscellaneous expenses and to compensate her for the loss of salary caused by the child's birth, and also to pay her ten dollars per week for its support until it reached the age of 21, upon condition that she would not institute bastardy proceedings against him as long as he made the payments in accordance with the agreement; (4) that she placed the child for adoption on July 13, 1954, and she claimed the following sums: Union Memorial Hospital, $110; Florence Crittenton Home, $100; Dr. George Merrill, her physician, $50; medicines $70.35; miscellaneous expenses, $20.45; loss of earnings for 26 weeks, $1,105; support of the child, $1,440; total, $2,895.80; and (5) that defendant paid her only $480, and she demanded that he pay her the further sum of $2,415.80, the balance due under the agreement, but he failed and refused to pay the same.[29]

Of course, the facts just described can be used to create two completely contrary pictures. In one, Hilda Boehm, an uneducated "old maid," is wined and dined by Louis Fiege, a sweet-talking "city boy," a man too cheap even to get a motel room. After becoming pregnant, Hilda suffers the humiliation of going to a "home" for unwed mothers and ultimately is forced to put her child up for adoption because of the father's refusal to provide support. The other picture, of course, is completely different. In this one, Hilda Boehm is looking to snare a husband. She allows Louis, a "mama's boy," to wine and dine her, and then she seduces him in the backseat of his car. Presumably she is trying the same routine on at least one other man. Ultimately, after she cannot get any more money from Louis—and, perhaps, from the other man—she abandons the child. The "magnetic current of thought" has electrified these raw facts.

It may be helpful to divide up the process of writing statements of facts into four separate steps. The first step involves, among other things, setting the stage for the overall legal theory developed later in the argument. The second and third steps deal with "marshalling" helpful facts and "explaining" harmful ones. The last step requires the writer to use grammar and word choice to create subtle effects of mood. Only the first and the last steps need explanations.

Surprisingly, few lawyers and students seem to realize that creating a statement of facts must follow, rather than precede, creating the legal arguments. This chronology must be observed because the statement of facts plays two crucial roles for the advocate. The second

29. 210 Md. at 355, 123 A.2d at 318-19.

role necessitates this order of preparation. As suggested above,[30] the statement of facts' first role is subtly to generate psychological sympathy for the represented client. This role has nothing to do with the merits of any legal position. It simply builds on the fact that judges and other dispute-resolvers are human beings, and human beings, even legally trained ones, quite often are influenced by emotional factors. The statement of facts' second role is to prepare the reader for the legal arguments to follow. This is its key role, which explains why the legal theory must always be planned first.

A complex example shows how the process works. Assume the following facts, which, as stated, do not attempt to reflect any partisan position:

> A, who owns and operates a bakery, desires to go into the grocery business. He approaches B, a franchisor of supermarkets. B states to A that for $18,000 B will establish A in a store. B also advises A to move to another town and buy a small grocery to gain experience. A does so. Later B advises A to sell the grocery, which A does, taking a capital loss and foregoing expected profits from the summer tourist trade. B also advises A to sell his bakery to raise capital for the supermarket franchise, saying "Everything is ready to go. Get your money together and we are set." A sells the bakery, taking a capital loss on this sale as well. Still later, B tells A that considerably more than an $18,000 investment will be needed, and the negotiations between the parties collapse.

In a lawsuit based on these facts,[31] A might advance several different legal theories. The most obvious, of course, is a theory based on his "reliance." Alternatively, A might argue that a full scale agreement was reached early in the discussions, and all that was needed thereafter was a formal document reflecting that agreement. Finally, A might argue that his actions created an "option contract" from which B could not withdraw. These different legal theories are noted because each should be introduced by a different statement of facts. For example, if A planned to assert the reliance theory, the statement of facts would emphasize facts demonstrating such reliance. That statement might also repeatedly use different versions of the word "reliance" (for example, "rely," "relied," "relying"). Furthermore, this statement of facts would be structured to use other specific words or phrases that would later reappear in the argument. For example, A's statement of facts might note that B "reasonably expected to induce" A to do certain acts, and that A's actions indeed

30. *See supra* notes 20-25 and accompanying text.

31. There was a lawsuit based on these facts. Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

did "induce B into the action of . . . ." These phrases, of course, directly echo the specific language of section 90 of the Restatement (Second) of Contracts,[32] the principle source of legal authority for A's reliance theory. Using these phrases in the statement of facts, and repeatedly using variations of the word "reliance," (hopefully) sets up in the reader's mind a subliminal positive reaction when the reader later encounters these same words in the legal theory portion of the argument.

A's statement of facts would differ completely from that just described, however, if the client were to advance a different legal theory. For example, if an "option contract" argument were planned, the statement of facts would concentrate on showing that the various facts established "part performance." Thus, facts that the previous statement of facts couched in the language of reliance would be used here to show performance. In addition, specific words and phrases drawn from applicable statutes and cases—this time, those dealing with option contracts—would be used. Thus, this statement might assert that B "invited" A to do certain acts, while the earlier described statement of facts would say that B "induced" A to do certain acts. This word choice is called for because the word "invite" appears in section 45 of the Restatement (Second) of Contracts,[33] a section dealing with option contracts, while the word "induce" appears in section 90, a section dealing with reliance.[34] A statement of facts constructed this way can do far more than merely relate facts.

The second and third steps in the process of writing statements of facts—"marshalling" helpful facts and "explaining" harmful ones—need no explanation.[35] The fourth step, however, deserves mention.

The form and structure of the English language can be used by lawyers to advance their clients' cases. Words alone can play a crucial role. For example, as Professor Llewellyn has demonstrated, readers of *Lucy, Lady Duff Gordon*[36] know who will ultimately win by the time they read the third word in the case. "The defendant styles herself . . . ," Justice Cardozo says.[37] He does not say that Lady Duff Gordon "claims to be" or "is" a designer of fashions. Those are neutral words. They carry no subtle messages. Rather, according to Justice Cardozo, she "styles" herself a designer. It is all downhill for her after that.

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32. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).
33. *Id.* § 45.
34. *Id.* § 90.
35. *See supra* notes 20-25 and accompanying text.
36. 222 N.Y. 88, 118 N.E. 214 (1917).
37. *Id.* at 88, 118 N.E. at 214.

Grammar also can play a part. Most professional writers know that sentences in the active voice generally create a strong or positive reaction. Sentences in the passive voice, however, create a more ambivalent mood. Lawyers can play upon this. Short sentences, as opposed to long ones, create these same impressions. Furthermore, poets and playwrites often use different meter and rhyme schemes when dealing with different characters. Again, lawyers can learn from them. In situations that involve very close calls on the substantive legal issues, subtle techniques such as these might well play a significant role in influencing the person reading the argument.

The foregoing illustrates two important lessons that students must learn before they can effectively practice the skill of using facts, or, for that matter, successfully study law in any "case" course. First, students must learn to read casebooks and brief cases as if they were studying long and extremely complex novels.[38] Only after they learn to read facts can they learn to "use" facts. Characters and themes encountered early in the books reappear again and again, although often in disguise. Similar factual problems repeatedly occur, each time to be met by different responses. Ideas or facts that seemed inconsequential, when first considered, assume increasing importance as the story progresses. Conflicts develop, only sometimes to be resolved. Different people face the same impossible choices. Second, students must learn to identify which facts, out of a mass of facts, they can use most advantageously to develop a substantive law argument. The development of such arguments, in turn, involves the use of other, more advanced skills, such as the skill of using statutes.

B. *The Skill Of Using Statutes*

> By far the hardest point to get across to beginning law students is a decent respect for the language of statutes. After even a few weeks of case-law analysis and synthesis, a first-year law student has discovered that the principle of law derived from a case or from a line of cases can be stated in several different forms of language, each of which constitutes an accurate statement. But a statutory rule of law is cast in an exclusive textual form. The beginning law student finds it extremely difficult, as for that matter do many members of the profession, to work comfortably with a legal principle of which there is only one authorized version. Inev-

38. Other writers have made this sort of analogy before. Professor Llewellyn compared a casebook to a Bach fugue. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 664 (1935). Dean Green discusses "the interesting tragedies of everyday life wrapped up in tort cases." Green, *Fifty Years of Tort Law Teaching*, 61 NW. U.L. REV. 499, 505 (1966).

> itably the beginner wants to handle statutes with the same freedom of paraphrase which he has found permissible in the statement of case-law principles.[39]

Discussions of complicated areas generally occur much more freely, and usually with much greater sophistication, when participants in those discussions know and speak a common language. Thus, American law schools, for example, require students and teachers to possess a solid working knowledge of the meaning of English words and the structure of the English language. Absent that knowledge, class discussion would not be profitable or efficient. In law, statutes provide the common language.[40] Development of the skill of using statutes, however, requires students to possess more than mere knowledge of the common language of the law. Students must learn how to use the text of the same statute or quasi-statue to the advantage of either side of a dispute. The principal mechanism for doing this involves identifying ambiguity or vagueness in statutes. Once advocates have identified such ambiguity or vagueness, they can generally use a statute, or several related statutes, to support either side of a dispute.

Four successive sections in the Restatement (Second) of Contracts provide an excellent mechanism for practicing the second skill. All of these sections deal with the idea of "acceptance" of offers. Section 58 of the Restatement (Second) sets out the standard rule: "An acceptance must comply with the requirements of the offer . . . ."[41] This is a somewhat relaxed version of the traditional "mirror image" rule. Section 59 follows with a minor variation. It describes something called a "Purported Acceptance Which Adds Qualifications."[42] Whatever it is, a "purported" acceptance is not an acceptance. Section 60 continues this approach of describing "counterfeit" acceptances when it describes an "Acceptance of Offer Which States Place, Time or Manner of Acceptance."[43] The first sentence of Section 60 states: "If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a

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39. Jones, *Notes on the Teaching of Legal Method*, 1 J. LEGAL EDUC. 13, 23 (1948) (footnote omitted).

40. Professor Llewellyn repeatedly talks about "the new language of the law." *See, e.g.*, Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 794 (1941). Other writers have used similar metaphors. Dean Young has written about "law as language." Young, *Formulating a Theory for Legal Education: Thoughts on Assuming a Deanship*, 5 HAMLINE L. REV. 1, 29-41 (1981).

41. RESTATEMENT (SECOND) OF CONTRACTS § 58 (1979).

42. *Id.* § 59.

43. *Id.* § 60.

contract."[44] So far, no problem. Again, noncompliance generates a counterfeit. But, then the fun starts. The second sentence of Section 60 states: "If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded."[45] This sentence, of course, reverses direction on the first sentence. It describes a real acceptance, not a counterfeit. Section 61 makes it worse. This section, "Acceptance Which Requests Change of Terms," initially describes a noncounterfeit: "An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated . . . ."[46] Then, however, it reverses direction when it qualifies that initial clause by adding "unless the acceptance is made to depend on an assent to the changed or added terms."[47] This is a counterfeit. These four sections of the Restatement (Second) provide students with excellent exercises for showing how a single set of facts can be interpreted in opposite ways in connection with the same operative statutes or "quasi"-statues. That is so, of course, because the facts of many of the classic "acceptance" cases, when viewed in light of sections 58 through 61 of the Restatement (Second), suggest both the existence and the nonexistence of an acceptance.

Other methods[48] provide equally valuable training in the skill of using statutes. Without doubt, one of the best ways to help students locate vagueness and ambiguity in statutes—and finding and manipulating these, of course, are the keys to the second skill—is to require students to compare and contrast two different statutes that address the same legal points. The different wording of such statutes usually reveals telltale ambiguity in both. Advocates can use ambiguity to create opposite interpretations. Most courses in law school—particularly most first year courses—can be taught in the context of two statutes. Contracts provides the ideal vehicle because of the existence of the Uniform Commercial Code and the Restatement (Second) of Contracts, a quasi-statute. Several of the other core first year courses, torts and property, for example, also have applicable Restatements and pertinent state or national codes, or model codes or acts.

Description of another important aspect of the skill of using statutes requires some background explanation. Students in "case"

44. *Id.*

45. *Id.*

46. *Id.* § 61.

47. *Id.*

48. Professor Statsky has provided a whole book of skills exercises relating to statutes. W. STATSKY, LEGISLATIVE ANALYSIS: HOW TO USE STATUTES AND REGULATIONS (1975). Many of Professor Statsky's exercises can be modified for use in a substantive course. For an example, see his exercise on breaking down a statute into its elements. *Id.* at 49-53.

courses quickly learn that they can phrase the legal principles articulated in, or the holdings of, particular cases in many different ways. All of these different formulations may be equally correct. The process of learning to do that draws students away from realizing that when dealing with statutes, rather than with cases, only one correct way of stating a principle exists. Flexibility disappears. Thus, for example, continuing to use as representative the Restatement (Second) of Contracts, there is but one authoritative version of the principle of the necessity of an acceptance complying with the terms of an offer. If one wishes to talk about this idea in the context of the Restatement (Second), the principle itself can be stated in only one way: "An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered."[49]

A simple example shows how students can be taught to use the precise language of applicable statutes. Consider these facts:

> A offers to sell a book to B for $5 and states that she (A) will not honor any other acceptance but the mailing of B's personal check for exactly $5. B personally tenders $5 in legal tender, or mails a personal check for $10.[50]

Most students when asked to analyze those facts in light of the Restatement (Second) will respond in something like the following manner:

> A is the master of the offer. She can set her own terms of acceptance. B's failure to respond in the method described means that the parties have not formed a contract.

Although students who answer in that fashion have indeed correctly stated the substantive law, they have done so by exercising a common law technique of analysis and not a statutory technique. The Restatement (Second), the quasi-statute at issue, states the principle in very specific and precise language. Students should use only that language when analyzing the problem from a statutory perspective. The foregoing answer does not contain that language. A teacher should require a student analyzing a problem in terms of a statute to restate the conclusion again and again until the student can directly integrate the problem's facts into the precise language of the statute. Only by doing this can students learn how a statutory analysis of the above-described problem proceeds:

> A stated that she (A) would not honor any acceptance but the mailing of B's personal check. By doing so, A established certain requirements of the offer as to the promise B must make or the

49. RESTATEMENT (SECOND) OF CONTRACTS § 58 (1979).
50. *See Id.* illustration 1.

> performance B must render. B's acceptance must comply with those requirements. Because it did not, no contract was formed.

Of course, the substantive content of the answer just quoted is precisely the same as that of the answer quoted earlier. Only the second answer, however, contains the precise statutory language.

Initially, students schooled in the case method rebel strongly against the perceived restraints set up by statutory language. Students would rather phrase their own principles. Indeed, learning to do that is itself an important skill. But it is a different skill, the skill of "synthesis."

C. *The Skill Of Using "Synthesis"*

> And one thing more. Briefing, I say, is valuable. Briefing, I say, is well nigh essential. Briefing is also the saddest trap that ever awaited a law student, if he does not watch his step. For the practice under pressure of time, as eyes grow tired in the evening, or the movies lure, is to brief cases *one by one*, and therefore blindly. Now if I have made one point in this discussion it should be this: that a case read by itself is meaningless, is nil, is blank, is blah. Briefing should begin *at the earliest* with the second case of an assignment. *Only after* you have read the second case have you any idea what to do with the first. Briefing, I say again, is a problem of putting down what in the one case bears upon the problem stated by the other cases. Each brief should be in terms of *what this case adds to what I already know about* this subject. Hence at least two cases must be read before any can be intelligently briefed. And as you pass to the third case and the fourth case, you have accomplished nothing unless both in your reading and your briefing of them you work at them with reference to the cases that have gone before. What does the case *add, what difference does it make*, to what I already know? This is the keynote of the brief. For this same reason, when you ever do any research in law, you must distrust your briefs, and distrust most the earliest ones you made. The earlier in the research the brief was made, the less you knew when you made it; hence, the more worthless it is. Read through the first found case again, and see! The chances are the first half of the briefs made in any one job of research belong on the ash-heap. The cases blossom under further study, under new reading. They yield more wisdom as your wisdom grows.[51]

The third skill involves the creation and use of legal "synthesis."[52] In this context, synthesis means bringing together two, three,

51. K. LLEWELLYN, THE BRAMBLE BUSH 54 (1960).

52. Many writers have used this term. Professor Patterson says that one of the merits of the case method is that it "requires the student to make his own synthesis of the subject matter

four, or more decided cases and other legal authorities as support for a single legal idea or proposition.

For some reason, the creation of synthesis seems to be surprisingly difficult for most students, and, for that matter, for most lawyers. When asked to formulate a legal argument based, for example, on four or five related cases, most students will simply talk about the cases one after another. They will first argue that the first case supports their position; then they will move on and say that the second case also helps them, and so on. Perhaps students do this because they have difficulty accepting the idea that arguments based on several cases are most persuasive when structured to show that common themes or ideas exist in all the individual cases. Once students have learned the value of this kind of structure in arguments, however, and have begun to learn the skill of using it, they quickly realize that individual cases have much more potent effect when linked to other cases. In short, students learn that the whole is greater than the sum of the parts.

The following bizarre examples—drawn from cases used consec-

. . . ." Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 21 (1951). Professor Jones talks of the "synthesis of decisions" as a crucial component of a beginner's legal education. Jones, *Notes on the Teaching of Legal Method*, 1 J. LEGAL EDUC. 13, 21 (1948). In a later work, Jones returns to the concept of synthesis as a method for helping students develop a "legal mind." Jones, *Objectives and Insights in University Legal Education*, 11 OHIO ST. L.J. 4, 5 (1950). Professor Hazard provides a concise definition of synthesis: "the putting together of two or three decisions on the same subject." Hazard, *Competing Aims of Legal Education*, 59 N.D.L. REV. 533, 535 (1983). Dean Levi describes synthesis as having a "circular motion." Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 506 (1948). "The first stage," he writes, "is the creation of the legal concept which is built up as cases are compared." *Id.* Professor Hornstein has stated that the purpose of placing before a law student a series of principal cases is to test the principle formulated and to synthesize it with related principles so that the end product is a well integrated corpus of knowledge. Hornstein, *The Myth of Legal Reasoning*, 40 MD. L. REV. 338, 346 (1981). Professor Weihofen defines legal synthesis as "the ability to take a mass of cases, as a lawyer has to do, and fit them into a pattern to find the law." Weihofen, *Types of Questions*, 23 ROCKY MTN. L. REV. 110, 115 (1951). Professor Weihofen provides examples in his paper for testing this skill. *Id.*

Dean Levi's description of statutory analysis and case law analysis provides insight into the differences between the thought process which operates in the use of the second skill and that which operates in the use of the third skill. In connection with the second skill, use of statutes, one argues from the general (that is, the statute) to the particular (that is, the facts of the specific case). In connection with the third skill, use of synthesis, one argues from the particular (previously decided cases) to the general (a concept or "rule" or proposition of law). Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 519-20 (1948). Actually, the third skill, as I define it, involves a third step. After one has reached the general, that is, formulation of a rule or proposition, then one must reason back to the particular, that is, application of the rule to the facts of the problem. In short, the third skill is the same as the second skill except that the legislature creates the "rule" used in connection with the second skill, and the advocates themselves create the "rule" used in connection with the third skill.

utively in Professors Farnsworth's and Young's contracts casebook[53]—demonstrate how to shape groups of cases into legal synthesis that supports a client's position:

> Ms. X should not be bound by her agreement to sell widgets to Mr. Y. Seven frequently cited contracts cases when read together, demonstrate that women cannot enter into enforceable business deals with men. In two of the seven cases, *Strong v. Sheffield*,[54] and *Newman & Snell's State Bank v. Hunter*,[55] the courts decided that women were not bound by business deals they had made with men. In two other cases, *Feinberg v. Pfeiffer Co.*,[56] and *Kirksey v. Kirksey*,[57] men were not bound by business deals they had made with women. Two cases establish related principles. *Feige v. Boehm*,[58] demonstrates that although women may not enter into "business" deals with men, they may enter into enforceable deals regarding domestic matters such as child-raising and support. *Hamer v. Sidway*,[59] demonstrates that women may enter into enforceable business deals with other women (Ms. Hamer, the winning plaintiff, obtained the nephew's claim in a business deal with the nephew's wife).[60] Finally, the seventh case, *Broadnax v. Ledbetter*,[61] is perfectly consistent with this analysis if we assume that the bounty hunter was a woman (the case itself does not reveal the sex of the bounty hunter). Because women cannot enter into enforceable business deals with men, Ms. X should not be bound by the deal she made with Mr. Y.[62]

Another example of synthesis follows:

> A should not be permitted to testify about oral agreements made with B in connection with the signing of a related written agreement between them. B and C, however, should be permitted to testify about oral agreements made between them in connection with the signing of a related written agreement. That is so, of

53. E. FARNSWORTH & W. YOUNG, *supra* note 4, at 44-73, 657-78.

54. 144 N.Y. 392, 39 N.E. 330 (1895).

55. 243 Mich. 331, 220 N.W. 665 (1928).

56. 322 S.W.2d 163 (Mo. Ct. App. 1959).

57. 8 Ala. 131 (1845).

58. 210 Md. 352, 123 A.2d 316 (1956).

59. 124 N.Y. 538, 27 N.E. 256 (1891).

60. The *Hamer* court noted this fact obliquely, referring to a "mesne assignment." The lower court opinion describes the transfer of claims. Hamer v. Sidway, 64 N.Y. Sup. Ct. 229, 11 N.Y.S. 182 (1890), *quoted in* E. FARNSWORTH & W. YOUNG, *supra* note 4, at 45 note a.

61. 100 Tex. 375, 99 S.W. 1111 (1907).

62. This bizarre synthesis works on several levels. First, it suggests to students that a group of cases can be made to stand for virtually any desired principle. That, of course, is an extremely important lesson. Second, although the synthesis itself seems ridiculous, students quickly begin to realize, as their studies progress, that a certain unfortunate truth may exist in it, namely, the blatant sexism in much of the law. *See* C. KNAPP, NOTES FOR TEACHERS USING [KNAPP] PROBLEMS IN CONTRACT LAW 15 (1977).

> course, because poor and stupid owners of small businesses who do not speak English and who are not represented by counsel will not be permitted to testify about oral agreements made in connection with the execution of related written agreements. All other people will be permitted to testify as to such matters. *Gianni v. Russel & Co.*;[63] *Lee v. Joseph E. Seagram & Sons, Inc.*;[64] *Masterson v. Sine*;[65] *Universal Builders v. Moon Motor Lodge, Inc.*;[66] *Bollinger v. Central Pennsylvania Quarry Stripping and Construction Co.*[67] In the present situation, only A is a poor, stupid owner of a small business, who is unable to speak English, and is unrepresented by counsel. Therefore, only A will not be permitted to testify about oral agreements made in connection with the execution of related written agreements.

These bizarre examples emphasize an important conceptual difference between the skill of using synthesis and the skill of using statutes. Statutes are, of course, the product of synthesis by legislators or legal scholars. To use a statutory synthesis, however, students and lawyers must work with a fixed commodity. Specific words exist in a statute. Those words cannot be changed. Conversely, students and lawyers using synthesis of their own creation have almost complete freedom to say whatever they want, to state a proposition of law however it will best serve their purposes. Thus, the two ridiculous propositions just stated are valid examples of synthesis, although no statute could be found to say similar things.

Traditional law school casebooks provide excellent resources for practicing the skill of using synthesis. These books generally contain groups of related cases, that is, three, four, or five successive cases revolving around similar substantive ideas. Although teachers usually use these groups of cases to develop fine points of substantive law, they can use the same cases to practice creation of synthesis. For example, teachers can ask students confronted with a series of five cases in a particular section of a chapter in a casebook to formulate a synthesis of all five. Perhaps this synthesis will explain a common theme running through all five cases, or identify a progression in the five from the first to the last.[68] These books provide other resources

63. 281 Pa. 320, 126 A. 791 (1924).
64. 552 F.2d 447 (2d Cir. 1977).
65. 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).
66. 430 Pa. 550, 244 A.2d 10 (1968).
67. 425 Pa. 430, 229 A.2d 741 (1967).
68. The cases used to form the synthesis about poor and stupid people and the "parol evidence" rule make up section one of chapter seven of FARNSWORTH & YOUNG, *supra* note 4, at 656-80. Obviously, students asked to form a synthesis regarding these cases will not come up with anything as strange as that noted herein. Again, however, a certain unfortunate truth may exist in the synthesis.

for practicing this skill. Professors Farnsworth and Young, for example, almost always use the last case in one section or chapter of their casebook as a transition to the first case in the next section or chapter. The last case looks forward, the first case looks back.[69] Students profit immensely in terms of developing the skill of synthesis when they must formulate synthesis explaining transitions between sections or chapters.

The Farnsworth and Young casebook provides more complicated patterns which are useful for teaching the skill of synthesis and serves as an excellent "model" useful to teachers using other books. Throughout the book, various sections run parallel to each other. For example, the cases in section one of chapter five, a section that deals with "capacity,"[70] run directly parallel to the cases in section two of that chapter, a section that addresses "unfairness".[71] The first case in section one, *Keser v. Chagnon*,[72] involves a less-than-innocent minor attempting to escape from a deal made with a much more knowledgeable business person. The first case in section two, *McKinnon v. Benedict*,[73] eliminates the fact of minority, but otherwise seems, when carefully examined, quite similar to *Keser*. In both cases, the courts refused to uphold the contracts, because to uphold them would have worked an unreasonable hardship on the weaker party. The second case in section one of chapter five, *Ortelere v. Teachers' Retirement Board*,[74] deals with an elderly, retired teacher who changed her pension to increase the monthly payment to take care of ongoing living expenses. Unfortunately, this change required eliminating death benefits for her spouse. The teacher died very shortly after the pension change was effected, and the court later set aside the change, holding that the woman did not possess the capacity to enter into a contract. The second case in section two of chapter five, *Tuckwiller v. Tuckwil-*

69. Chapter seven begins with Gianni v. Russel & Co., 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968). In *Gianni*, an uneducated person was not allowed to testify about the "reality" of an oral deal. Although the defendant did not deny the existence of the oral deal, the technical defense of the parol evidence rule defeated Gianni's claim. E. FARNSWORTH & W. YOUNG, *supra* note 4, at 657. The last case in chapter six is Southwest Eng'g Co. v. United States, 341 F.2d 998 (8th Cir. 1965). In this case, a liquidated damages clause was used to generate a large award even though both sides to the dispute agreed that no actual damages had occurred. E. FARNSWORTH & W. YOUNG, *supra* note 4, at 647. In effect, exactly the same thing occurred in both *Gianni* and *Southwest*: a technical legal issue blocked a common sense resolution.

70. E. FARNSWORTH & W. YOUNG, *supra* note 4, at 350.

71. *Id.* at 365.

72. 159 Colo. 209, 410 P.2d 637 (1966).

73. 38 Wis. 2d 607, 157 N.W.2d 665 (1968).

74. 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969).

ler,[75] runs on a parallel track. It involves an elderly, and presumably retired, female teacher. She, too, entered into a contract to provide ongoing care for herself. She, too, died very shortly after entering into the contract. In this case, however, the court upheld the contract. The third case in each section[76] of chapter five of this casebook involves one party making an enormous profit. Teachers who repeatedly ask their students to identify these kinds of patterns give those students continuing training in synthesis techniques.

Teachers can make another important use of traditional casebooks in connection with development of the third skill. This use pushes students beyond mere "creation" of synthesis into "use" of synthesis. Casebooks return again and again to cases with similar factual settings. For example, the Farnsworth and Young casebook, particularly the second half, could easily be entitled, *Cases and Materials on the Grading and Excavation of Land.*[77] That book also repeatedly presents cases in which apparently ruthless franchisors terminate apparently kindly franchisees. Students can practice use of synthesis by representing one of the sides in one of these factually similar cases, and creating a synthesis helpful to their new client by combining the other cases.

Corenswet, Inc. v. Amana Refrigeration, Inc.,[78] a case placed near the end of chapter five of Farnsworth and Young, illustrates how this exercise works. Corenswet, a franchisee, had only a terminable, at-will contract. Amana suddenly cut off the contract. Students asked to formulate a synthesis helpful to Corenswet will usually arrive, eventually, at something like this: Even absent the existence of a contract clearly protecting them, franchisees terminated by franchisors, essentially without notice, will at least be allowed reasonable periods of time to wind up business and recoup losses. When asked to provide case law support for this synthesis, students can cite two franchise cases studied in chapter four of the casebook, *Goodman v. Dicker*[79] and *Hoffman v. Red Owl Stores*,[80] and at least one franchise-type case

75. 413 S.W.2d 274 (Mo. 1967).

76. Cundick v. Broadbent, 383 F.2d 157 (10th Cir. 1967); Black Indus., Inc. v. Bush, 110 F. Supp. 801 (D.N.J. 1953).

77. The mound of grading cases in Farnsworth & Young quickly piles one upon another. *See* Evergreen Amusement Corp. v. Milstead, 206 Md. 610, 112 A.2d 901 (1955); Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235 (1939); Watkins & Sons v. Carrig, 91 N.H. 459, 21 A.2d 591 (1941); Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962); Bollinger v. Central Pa. Quarry Stripping & Constr. Co., 425 Pa. 430, 229 A.2d 741 (1967) (all cases cited in E. FARNSWORTH & W. YOUNG, *supra* note 4, at 394-703).

78. 594 F.2d 129 (5th Cir. 1979).

79. 169 F.2d 684 (D.C. Cir. 1948).

80. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

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studied in chapter three, *Lee v. Joseph E. Seagram & Sons, Inc.*[81]

Near the beginning of this discussion of the skill of creating and using synthesis, it was noted that students have considerable difficulty recognizing that use of groups of cases linked by common themes is more persuasive than mere use of one case after another, each case standing as an isolated unit. By that, it was not in any way meant to suggest that individual cases should not be used individually. In fact, individual cases often provide lawyers with their most potent weapons. But the weapons are those of "analogy," not synthesis.

D. *The Skill Of Using Analogies*

> So what is it that lawyers and judges know that philosophers and economists do not? The answer is simple: the law. They are the masters of "the artificial Reason of the law." There really is a distinct and special subject matter for our profession. And there is a distinct method down there in that last twenty feet. It is the method of analogy and precedent. Analogy and precedent are the stuff of the law because they are the only form of reasoning left to the law when general philosophical structures and deductive reasoning give out, overwhelmed by the mass of particular details. Analogy is the application of a trained, disciplined intuition where the manifold of particulars is too extensive to allow our minds to work on it deductively. This is not a denial of reason; on the contrary, it is a civilized attempt to stretch reason as far as it will go. The law is to philosophy, then, as medicine is to biology and chemistry. The discipline and analogy fills in the gaps left by more general theory, gaps which must be filled because choices must be made and actions taken.[82]

The skill of using "analogies" builds upon one of the core ideas of legal reasoning, the idea of "precedent" or "stare decisis." Simply put, that idea is this: cases should be decided today the same way they were decided in the past. The skill of using analogies provides a method for demonstrating that a particular case or problem, newly encountered, is very much like a particular case decided in the past. This is done by the creation of elaborate analogies[83] between the facts

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81. 552 F.2d 447 (2d Cir. 1977).

82. Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981) (footnote omitted).

83. Dean Levi argued that the "key step" in the legal process is "[t]he finding of similarity or difference . . . ." Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 502 (1948). "[Lawyers must learn] to pick out key similarities and to reason from them to the justice of applying a common classification." *Id.* at 502. Dean Levi's analysis of "reasoning by example" is the basis for my articulation of the skill of use of factual analogies. *Id.* at 504-06. His analysis of the "inherently dangerous" cases is a splendid example of using factual

of a present dispute and the facts of one previously decided.[84] Demonstrations of factual similarity between the present and the past trigger application of the idea of stare decisis.

Perhaps the skill of using analogies is best defined by comparing it to an earlier described skill, using synthesis. As noted earlier,[85] to create and use a synthesis, students or lawyers must formulate a single proposition and then support it by reference to two, three or more previously decided cases or other legal authorities. In short, a synthesis is a single legal idea followed by a listing of several authorities. Individual past cases, by themselves, are not important in the context of that skill. They are important only because groups of them lend support to an overall proposition or idea. The skill of using analogies concentrates on the facts of a single past case, not ideas, propositions, or rules emerging from a group of past cases.

A simple illustration demonstrates how a synthesis approach differs from an analogies approach. Assume these facts:[86]

> A mother, in good faith, seeks support for an illegitimate child from that child's putative father. The father promises to provide

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analogies. *Id.* at 507-19. Professor Landau also carefully describes the process of using legal analogies. Landau, *Logic For Lawyers*, 13 PAC. L.J. 59, 76-82 (1981). Professor Landau attempts to show how this legal skill is closely related to the classic definition of "inductive" reasoning. *Id.*

Other writers have also discussed the process of using analogies. Dean Young includes in his definition of case analysis the possibility of finding analogies and similarities. Young, *Formulating a Theory for Legal Education: Thoughts on Assuming a Deanship*, 5 HAMLINE L. REV. 1, 67-68 (1981). Professor Strong, in his proposed new curriculum, states that one of the objectives of teaching legal methods is to give students a working understanding of the principles of "reasoning by analogy." Strong, *A New Curriculum for the College of Law of The Ohio State University*, 11 OHIO ST. L.J. 44, 46 (1950). Unfortunately, when Professor Strong later describes in detail the specific legal skills students must develop in school, he does not list reasoning by analogy. *Id.* at 47-48. Professor Luban describes the process of using analogies in these words: "One looks at the precedents, and finds analogies between their fact patterns and that of the instant case (one reads the precedent widely so that it is dispositive); or one finds disanalogies (one reads the precedent narrowly and distinguishes the cases)." Luban, *Against Autarky*, 34 J. LEGAL EDUC. 174, 176 (1984). My own belief differs somewhat. Teaching students to "distinguish" cases teaches only half the lesson. If a case truly can be distinguished, it can also be shown to be consistent with a related point and thus supportive of a proposed argument. *See infra*, text accompanying note 110.

84. Without question, some similarity exists between the skill of using facts and the skill of using analogies. Both involve facts. The differences between the two, however, are crucial. The first skill involves characterization of facts in such a way as to generate sympathy for one side or the other. The facts stand alone. In contrast, the skill of using analogies reflects the common law doctrine of precedent. It allows students to show that the facts of a problem are very similar to the facts of decided authority. The facts do not stand alone, but rather in conjunction with those of a decided case.

85. *See supra* note 52 and accompanying text.

86. The facts of this example are drawn from Fiege v. Boehm, 210 Md. 352, 123 A.2d 316 (1956). *See supra* text accompanying notes 27-29.

> such support in exchange for the mother's forbearance to file bastardy proceedings against the father. Blood tests later show that the man could not have been the child's father. He ceases making payments and the mother sues.

The legal question is this: Is the mother's forbearance to sue on the individual claim consideration for the putative father's promise to pay? A third skill (synthesis) approach to that problem, from the mother's perspective, might look something like this. First, the advocate would lay out a helpful legal proposition, idea, or rule, for example: The law favors settlement by parties of disputed claims; thus a claimant should be allowed to enforce a settlement promise even if the underlying claim proves to be invalid. After stating the proposition, the advocate would follow it with a brief listing and description of several cases that lend support. The first such case, of course, might be *Fiege v. Boehm,*[87] the Hilda/Louis soap opera discussed earlier. After citing *Fiege*, the advocate would cite three or four other cases lending support to the articulated proposition,[88] with no more than a minimal discussion of the separate cases.

A fourth skill (analogies) approach to the same paternity problem would look completely different. It would concentrate entirely on the facts of one case, perhaps *Fiege.* Such an approach, again advancing the mother's side, might look like this. First, the legal question would be presented: should a mother who forbears from bringing bastardy proceedings against her child's putative father be allowed to enforce that putative father's promise to pay support payments if the child ultimately is determined not to be related to that man? Then the question would be answered: yes, such a promise should be enforced. Thereafter would follow a transition to the heart of the factual analogy: that conclusion is an appropriate one because another court, when faced with a factual situation very similar to the present one, concluded that a similar promise should be enforced.

The factual analogy itself would consist of a detailed comparison between the facts of the problem and the facts of the previously decided case. First, the various parties involved in the present dispute could be compared to the parties involved in the decided case:

> In *Fiege v. Boehm,* the parties to an agreement were . . . ; likewise, in the present case, the parties to an agreement are [same].

Second, the circumstances leading up to the disputes in the decided

87. 210 Md. 352, 123 A.2d 316 (1956).

88. *See* Ralson v. Matthew, 173 Kan. 550, 250 P.2d 841 (1952). Casebooks usually provide this type of supporting authority in the notes preceding or following principal cases. *See* E. FARNSWORTH & W. YOUNG, *supra* note 4, at 57.

case and in the present problem could be compared. For example, in contract cases, promises made and circumstances in which they were made would be compared:

> In *Fiege v. Boehm*, the parties agreed that . . . and this agreement was reached after . . . ; likewise, in the present case, the parties agreed that [same] and this agreement was also reached after [same].

Third, activities or consequences occurring after the disputed event might be compared. In contract cases, circumstances occurring after promises were made would be compared:

> In *Fiege v. Boehm*, the putative father made payments to the mother for several years. Thereafter, he ceased making such payments when a blood test revealed that he could not have been the father. Likewise, in the present case, the father made such payments until such time as he received notice that he was not the father. Thereafter he stopped making payments.

Once the analogy itself has been described, the argument might end with the following conclusion:

> As demonstrated, another court has faced a factual situation very similar to the present one. In *Fiege v. Boehm*, the court concluded that the promise should have been enforced. Cases should be decided today the same way they were decided in the past; hence, the present promise should be enforced because a like promise was enforced in the past.[89]

The foregoing example involved creation of a factual analogy comparing two sets of very similar facts. Although, from time to time, circumstances do indeed arise where lawyers find decided cases with facts (and results) very similar to the facts (and desired results) of a new dispute, this is uncommon. More often, a lawyer is first challenged to locate a decided case that reaches a result consistent with the desired result. Second, the lawyer must show that the facts of that case, although appearing to differ from the facts of the present dispute, do not really differ at all. One way to do this involves creation of "joint statements of facts." A joint statement of facts is a statement of facts that can be used for two different cases or for a past case and a present dispute.

Joint statements of facts can be prepared by identifying in the

89. In my own classes, I repeatedly drill students in this four-part format for using factual analogies—Introduction, Transition, Analogy, Conclusion. It has been my experience that beginning students tend to have very serious problems organizing their legal ideas. Formats, such as the mine, enable students to get quickly beyond these organizational difficulties. Later in this paper I propose an elaborate format for constructing entire legal arguments. *See infra* text accompanying notes 122-123.

several cases what might be called the "lowest common denominator" of facts. An example of this is more useful than a definition. If one of a pair of cases[90] involved a liquor store and the other a grocery store, a common denominator of fact would be that both cases dealt with stores involved in the sale of "goods." But the term "goods" is far too broad. Almost every store sells goods. A lower common denominator of fact should be found. Such a lower common denominator would be that both stores sold "consumer goods." Use of this term eliminates a lot of stores but still fits both the liquor store and the grocery store. An even lower common denominator of fact would be that both cases involved stores that sold "consumable" consumer goods. Use of this term eliminates virtually all stores except those involved in the two cases. Thus, the term is a very low, or maybe even the lowest, common denominator of fact.

A rather complex example demonstrates how the skill of using analogies can bring apparently dissimilar cases together. Consider *Hamer v. Sidway*,[91] the famous case involving the uncle (Bill) who promised his nephew (Willie) $5,000 if the nephew quit smoking and gambling. The nephew's successor recovered on a contract theory. Consider also *Feinberg v. Pfeiffer Co.*,[92] another famous case, sometimes discussed in contracts courses soon after *Hamer v. Sidway*.[93] In *Feinberg*, a company promised a pension to an elderly woman because of her long years of service. She could begin drawing the pension, she was told, whenever she wanted. Several years later she started drawing the pension but thereafter the pension was cut off. Although Mrs. Feinberg failed to establish the existence of an enforceable contract, she recovered on a reliance theory.[94]

Superficially, *Hamer* and *Feinberg* look like completely different factual situations. Close analysis, however, demonstrates how the facts of these cases can be made to look very much alike. The approach starts, of course, with a comparison of the parties to both disputes. In both *Hamer* and *Feinberg*, one party—the uncle in *Hamer* and the company in *Feinberg*—was in a dominant financial

90. This example is based on two cases used as principal cases in Professors Farnsworth's and Young's casebook. Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447 (2d Cir. 1977) (the liquor store case), *reprinted in* E. FARNSWORTH & W. YOUNG, *supra* note 4, at 235; Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (the grocery store case), *reprinted in* E. FARNSWORTH & W. YOUNG, *supra* note 4, at 341.

91. 124 N.Y. 538, 27 N.E. 256 (1891), *reprinted in* E. FARNSWORTH & W. YOUNG, *supra* note 4, at 44.

92. 322 S.W.2d 163 (Mo. App. 1959).

93. *Feinberg* appears on page 96 of the Farnsworth and Young casebook, *Hamer* on page 44. E. FARNSWORTH & W. YOUNG, *supra* note 4, at 44, 96.

94. *Feinberg*, 322 S.W.2d at 168-69.

position. Likewise, in both cases, the opposite side in the dispute was a member of what might be considered a "protected group," a minor and an elderly retiree. Further, in both cases, a family-type relationship existed. Willie, of course, was Uncle Bill's nephew. Mrs. Feinberg was a forty year employee of a family business, and was, apparently, personally close to the patriarch of the company.[95]

Once the parties to different disputes have been shown to be analogous, a fourth skill approach looks for analogies in the circumstances leading up to the dispute. As noted earlier, in contract cases this approach looks to the promise itself and the setting in which that promise was made. In both *Hamer* and *Feinberg*, for example, the dominant party made a promise primarily because doing so gave him a sense of personal well-being. Each promisor made the promise to improve the promisee's quality of life. Furthermore, each promisor made the promise in a family-type setting. In *Hamer*, it occurred at a big party. In *Feinberg*, some of the family members went to Mrs. Feinberg's house to tell her of the promise. They did not simply inform her when she returned to the office. In both cases, a writing ultimately evidenced the promise. Finally, in both cases, the promise itself was a non business-type promise that would involve conduct over a period of many years. In *Hamer*, the promise involved encouraging the nephew to behave for five years. In *Feinberg*, the promise was for lifelong support of an elderly person.

As noted earlier, the third aspect of an analogies approach could involve comparison of facts that occurred after the dispute arose. Again, in contracts cases, this might involve what happened after the promise was made. In this respect, *Hamer* and *Feinberg* are once again not as different as they initially appear to be. In each case, the promisor reinforced the promise after making it. In *Hamer*, Uncle Bill acknowledged the promise and admitted that Willie had complied. In *Feinberg*, the company paid the pension for several years. Likewise, in both cases, after the promise was made and then acknowledged, the promisor attempted to change the promise. Uncle Bill changed the promise when he wrote Willie that he, Bill, would hold the money until Willie was "capable of taking care of it."[96] In *Feinberg*, the company continued to pay, but attempted to reduce by one-half the payment to Mrs. Feinberg. Finally, in both cases, the

95. Students—and lawyers—have a tendency to skip over minor points of analogy in order to get to the obvious points. A systematic approach addresses this unfortunate tendency. The present example reveals the problem. Students almost never see the family-type analogy between *Hamer* and *Feinberg* unless they are prohibited from moving beyond an analysis of the parties in the cases for a relatively long period of class time.

96. *Hamer*, 124 N.Y. at 540, 27 N.E. at 256.

original promisor was not the one who ultimately refused to perform. In *Hamer*, Uncle Bill died and his estate refused payment. Likewise, in *Feinberg*, the patriarch of the family business, the principal promisor, died; his widow initiated the plan to cut off Mrs. Feinberg's pension.[97]

The foregoing analysis shows how two cases that initially appear to be factually quite different can be shown to be quite similar. The ability to do this provides lawyers with an invaluable tool. Reference to *Hamer* and *Feinberg* shows why. Had Mrs. Feinberg's lawyers been able to construct a factual analogy between the facts of their dispute and the facts of *Hamer*, they might well have won the lawsuit on a consideration or contract theory and would not have had to resort to a reliance theory. Under modern contract law, this could be crucial. Damages awarded in reliance situations may be lower than damages awarded in consideration situations.[98] Thus, Mrs. Feinberg's damages under a reliance theory could have been lower than her damages would have been under a consideration theory.

This discussion of the fourth skill, using analogies, began with a quotation about what it is that lawyers and judges know that philosophers and economists do not.[99] The quotation continued: "Analogy and precedent are the stuff of the law because they are the only form of reasoning left to the law when general philosophical structures and deductive reasoning give out, overwhelmed by the mass of particular details."[100] It should now be clear that use of that overwhelming mass of particular details is the key to the fourth skill. The mass of details provides the resources for the creation of extremely elaborate analogies. That mass of details, however, also provides lawyers with another invaluable tool. A skilled lawyer can look at that mass of details and single out of it one or two points, discarding all the rest. Then the lawyer can argue that only these few details reflect the underlying meaning of the law, only these few details reflect true values. All the rest, the lawyer concludes, is surplusage. But doing this,

97. Students, not drilled in a use of facts approach, rarely see the significance of the fact that the widow of the principal promisor attempted, after that promisor's death, to cut off the pension of this forty year female employee of the promisor. Thus, *Feinberg* provides a good follow-up first skill exercise to *Fiege v. Boehm*. *See supra* notes 27-29 and accompanying text.

98. Section 90 of the Restatement (Second) of Contracts establishes that idea in connection with its discussion of reliance-based reasons for enforcing promises. The second sentence of subsection one of section 90 provides: "The remedy granted for breach may be limited as justice requires." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). When *Feinberg* was decided in 1959, of course, this idea had not been codified in the Restatement (Second).

99. Fried, *supra* note 82, at 57.

100. *Id.*

it might be said, is not the same as using analogies. Indeed it is not. It is a different, and far more difficult skill, the skill of using "policy."

E. *The Skill Of Using "Policy"*

> Law students sometimes speak as though they learned nothing in school. In fact, they learn skills, to do a list of simple but important things. . . . [T]hey learn a list of balanced, formulaic, pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation in spite of a gap, conflict or ambiguity or that a given case should be extended or narrowed. These are arguments like "the need for certainty" and "the need for flexibility," "the need to promote competition" and the "need to encourage production by letting producers keep the rewards of their labor."[101]

In his article on law students' skills development, Professor David Bryden identifies "functional analysis" as one of the key skills.[102] "Lawyers often seek," he writes, "to understand the meaning or scope of a rule or category by reference to its purpose. This sort of reasoning, sometimes called 'functional analysis,' is a valuable supplement to more literal interpretations of legal authorities."[103] Without doubt, he is correct. Very often, statutes or previously decided cases do not directly address problems at issue in new disputes. In such situations, students, lawyers, and judges must discover the policies and purposes behind case law and statutes. Once discovered, these can be applied to the new disputes.

Unfortunately, attempts to train students in functional analysis may not be completely successful. Law students quickly learn that policy reasons can usually be advanced for both sides in a dispute. This, of course, is not surprising. Casebook authors love cases that force students to confront policy choices. For example, in virtually any contracts casebook, students will find disputes that involve one-sided contracts between small companies and larger ones.[104] The smaller company, seeking to set aside the deal, undoubtedly argued in the case that the law's policy ought to protect small companies from predatory larger companies. This is sound policy. The larger com-

101. Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982). Professor Kennedy's intended irony cannot be grasped fully from this short quote. For the full quote, see *supra* note 16.

102. Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479 (1984).

103. *Id.* at 481.

104. Professors Farnsworth's and Young's casebook contains many such cases. This paper has already referred to two of them. Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447 (2d Cir. 1977); Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965). They are found in E. FARNSWORTH & W. YOUNG, *supra* note 4, at 341, 235.

pany, seeking to enforce the deal, undoubtedly argued that the law's policy in a free market system ought to promote laissez faire economics. This, too, is sound policy. Cynicism about the law—a sense of alienness?— can quickly develop when students continually see equally persuasive policy arguments on both sides of an issue.

A straightforward functional analysis approach to legal education has another serious drawback. It encourages students to make policy choices before they need to do so, and, perhaps, before they are capable of wisely doing so. For example, in the large company v. small company illustration, some students will conclude that a laissez faire perspective is more correct. Others will make the opposite choice. Students will make these choices despite repeated efforts by teachers to demonstrate that both policies are sound, perhaps equally so. Choices will be made because students, particularly beginning students, instinctively rebel against the fluidity of the law. They want answers, they want choices to be made. They do not appreciate ambiguity and indecisiveness. Students are, in most situations, considerably younger than teachers. Because age itself is a major factor leading to law teachers' ability to see two conflicting policies as equally persuasive, students who do not share that ability may well be penalized simply for being young.

A policy approach, concentrating on "use" of policy rather than on its "discovery," gives students the experience of working with policy but allows them to hold in abeyance their own personal choices. Choices made in connection with this suggested approach are choices as to what policy argument best supports a particular side in a particular dispute. No choice is made as to what policy argument is the better one. In effect, this approach gives students an excuse for *not* making personal policy choices. A functional analysis approach gives no such excuse. The approach suggested herein also corresponds to the reality of actual legal practice. Most lawyers deal with policy issues in most situations by seeking to find, not the correct or sound policy, but the policy that advances their client's interests. Students recognize that fact and respond favorably when their education also recognizes it.

What, then, is a policy argument, and what must students learn to do in order to be able to make such arguments for one side or the other in a dispute? First, they must learn that a policy statement must be different from and always larger than the rule or holding of a particular case. In fact, it must be larger than the law itself, larger than the province of lawyers. It is something of interest to lay people as well.

An example shows how to differentiate rules from policies. In *Hamer v. Sidway*,[105] for example, the case involving Uncle Bill and his nephew Willie, the rule or holding might be stated this way: Willie's forbearance is a performance and if bargained for is consideration for Uncle Bill's promise.[106] Students, asked to make a policy argument for the claimant in this case (Willie's successor to the claim against Uncle Bill), regularly suggest that policy encourages use of the "bargain theory" of contracts. But this idea, of course, is no larger than the case itself, and certainly no larger than the field of law. Lay people have no interest in that idea. Something larger, perhaps much larger, must be identified as a policy. Professor Farnsworth shows how it can be done:

> [T]o the extent that the [bargain] theory eliminated any requirement of benefit or detriment, it made some promises enforceable that might previously have been unenforceable. It did so by shifting the concern of judges away from the substance of the exchange. Their sole inquiry now was into the process by which the parties had arrived at that exchange—was it the product of "bargain"? This development accorded well with the prevailing mood of nineteenth-century America, which placed its trust in free enterprise and in the dignity and creativity of the individual. Had not Adam Smith written that it was through the competitive process of "bargaining" that society could best take advantage of what he called man's "self-love"? Under the bargain theory a promise that had been exchanged as a result of that process satisfied the fundamental test of enforceability without more.[107]

Professor Farnsworth's statement, of course, deals with something much larger than the bargain theory. He shows how that theory fits into a much larger scheme, a scheme of laissez faire economics. This, indeed, is a policy explanation of *Hamer*. It is something that moves outside the province of lawyers. Lay people would be interested in this explanation because it is larger than legal issues.

The policy statement just quoted also satisfies the second element of policy argument that students must learn. That second element is this: policies, which must be larger than the specific legal issues addressed, must also be shown to be applicable to completely different types of legal issues. The policy statement to be used in connection

105. 124 N.Y. 538, 27 N.E. 256 (1891).

106. *Hamer* is the basis of this wording, which is drawn from the Restatement (Second). RESTATEMENT (SECOND) OF CONTRACTS § 71 comment d, illustration 9 (1979) (based on Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (1891)).

107. E. FARNSWORTH, CONTRACTS § 2.2, at 42 (1982) (footnotes omitted).

with *Hamer* must be a policy statement that can be shown to govern something in addition to the principal legal question specifically at issue, namely, what promises will be legally enforceable? Professor Farnsworth's market philosophy policy does this. It can be used to support many contract law ideas. For example, such a policy could be shown to guide the mechanism for determining whether an offer or acceptance has been made, or calculating the damage award.

It is easy to see why policy statements should be shown to control other legal issues distinct from those issues directly addressed. Most disputes involve several legal issues. All involve at least two—the substantive issue and the penalty or damages issue. Legal arguments as a whole become exceptionally compelling if the same underlying policy theme supports several different parts of the total argument. Again, the *Hamer* case shows how this can be done. Several methods exist in contract law for calculating damages. The "expectation measure" and the "reliance measure" are the two most important ones.[108] The reliance measure often produces less damages than the expectation measure. In *Hamer*, Uncle Bill's estate could have argued that if liability existed, the reliance measure of damages should have been used. This argument would have been based on a theory that enforcement in the case should have occurred, if at all, on a "promissory estoppel" basis rather than on a consideration basis. This reliance measure argument, if successful, could have drastically reduced the damages awarded against the estate.[109] The claimant could have responded to this argument with a policy argument which would have directly echoed the free market policy argument advanced above. For example: in a long-term transaction situation, market economic theory suggests that the full measure of expectation should be used to calculate damages. Thus, the claimant in *Hamer* could have used the same overall policy argument to support two separate parts of the claim, namely, that the promise should be enforced, and that the full, expectation measure of damages should be awarded. Each part of the argument reinforces the other part.

Policy arguments provide students and lawyers with at least one additional and valuable method of approaching legal problems. Because policy arguments cut through the mass of detail, discarding supposedly irrelevant materials, this type of argument can be particularly useful in dealing with decided cases that apparently contradict

108. RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 349 (1979).

109. The theory, of course, would be based on the idea of limitation of damages in reliance situations. *See id.*; *supra* note 98 and accompanying text. Criticism of Uncle Bill's lawyers should not be inferred. This damage limitation idea did not exist in a Restatement when *Hamer* was decided.

the lawyers' positions. Policy arguments can be advanced that assert that the apparently contradictory cases are merely details to be discarded, details that do not correctly reflect larger policy choices. Surprisingly, these types of policy arguments sometimes work. There exists, however, a much more effective technique of using policy to deal with apparently contradictory materials. The technique, that of "reconciling" apparent contradictions, is by far the most difficult skill described herein. It is a skill most lawyers never master. Its successful use, however, quite often leads to triumph.

F. *The Skill Of "Reconciling" Apparent Contradictions*

In 1874, in his first Harvard law school lecture, Professor Thayer quoted an 1844 entry from the journal of attorney Rufus Choate:

> "29th September—A little attention to things and persons and reputations about me teaches that uncommon professional exertions are necessary to recover business, to live,—and one trial or two teaches me that I can very zealously and very thoroughly and *con amore* study and discuss any case. How well can I do so, compared with others, I shall not express an opinion on paper—but if I live, all blockheads which are shaken at certain mental peculiarities, shall know and feel a reasoner, a lawyer, and a man of business. In all this energy and passion I mean to say no more than that the utmost *possible painstaking with every case* is perfectly indispensable, and fortunately not at all irksome. The case at hand demands, invites to a most exact, prepared, and deep legal and rhetorical discourse."
>
> Observe here precisely what he says: "The utmost possible painstaking with every case"—not merely the cases that pay the best, but "every case" that he undertook. This indicates Mr. Choate's habit, the habit of any worthy member of a liberal profession and of every sound and high-minded lawyer. Mr. Choate was a man of genius and he was also a most laborious lawyer. That such a man gave and needed to give this "utmost possible painstaking" to every case is an instructive fact, and ought always to be remembered by any who appeal to his example in other respects.[110]

One of the most troubling and most common legal problems lawyers face is that there always seems to be a case that supports the other side's argument in a dispute. No matter how beautifully constructed an argument may be, no matter how compelling its theory, some case stands in the way. That case, of course, is the opponent's

110. Howe, *The First Law School Lecture of James Bradley Thayer*, 2 J. LEGAL EDUC. 1, 12 (1949).

strongest. A simple illustration demonstrates how the contradictory case problem arises:

> Uncle David attended a large family celebration. At that celebration, in front of a group of relatives, he spoke to Jennifer, the widow of his late nephew. "If you will come down and see me, I will let you have $5,000. I feel like I want you and the children to do well." Jennifer did as she was asked and then requested the money. Unfortunately, Uncle David died and his estate refused to pay.

Of course, anyone familiar with contract cases will recognize that this set of facts splits the difference between *Hamer v. Sidway*,[111] the uncle/nephew case discussed earlier, and *Kirksey v. Kirksey*,[112] another classic case. In *Hamer*, the uncle's promise was enforced. In *Kirksey*, however, the court did not enforce the promise. In that case, a man told his sister-in-law that he would give her a place to live if she would come down to see him. She did so, and, for a time, he gave her a place to stay. Thereafter, the brother-in-law evicted her from the land. Although, of course, the result in *Kirksey* might be different today because of the current acceptability of reliance theories, the case itself remains very interesting on the consideration point. Each lawyer involved in the Uncle David/Jennifer dispute would be in the same legal position. The lawyer for Uncle David's estate, trying to set aside the deal, would rely heavily on *Kirksey* but would be met squarely by *Hamer*. Conversely, Jennifer's lawyer, trying to uphold the deal, would be assisted by *Hamer* but apparently harmed by *Kirksey*.

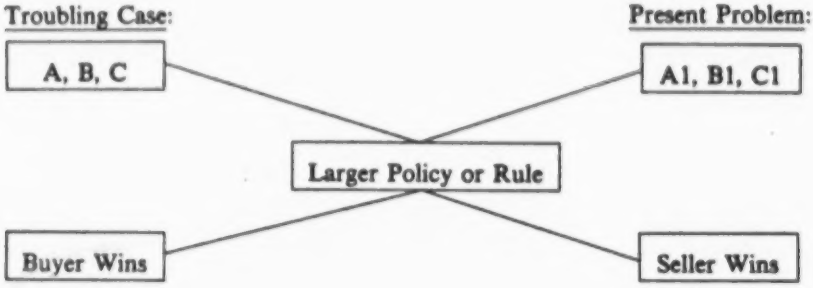
Most law students and lawyers who encounter decided cases that appear to contradict arguments they seek to advance consider their work complete when they have "distinguished" the apparently contrary cases.[113] Distinguishing cases is the process by which lawyers attempt to show that apparently contrary cases, for whatever reasons, have no applicability. In the dispute between Uncle David's estate and Jennifer, both lawyers might argue, for example, that the harmful cases should not apply because the relationship of the relatives in those cases was not the same as the relationship in the present dispute. Further, Jennifer's lawyer might argue that *Kirksey* should not apply because the promise there did not occur at a big family celebration in front of many people. Conversely, the lawyer for Uncle David's estate might argue that *Hamer* should not apply because there the

111. 124 N.Y. 538, 27 N.E. 256 (1891).
112. 8 Ala. 131 (1845).
113. *See, e.g.*, Luban, *supra* note 83, at 176.

promisee had performed for five years, whereas in the present dispute, Jennifer only acted for a short period of time.

The skill of using apparent contradiction allows students and lawyers willing to engage in the "utmost possible painstaking" to "reconcile" contrary cases rather than merely to distinguish them. Reconciling cases is the process by which lawyers show that apparently contrary cases actually support, rather than refute, desired conclusions. The process by which lawyers reconcile cases is easy to describe but extraordinarily difficult to do. It involves three steps. First, the lawyer must "distinguish" the cases, that is, show that they differ on the facts. Of course, this is where many lawyers stop. Second, the lawyer must show that the troubling case actually reflects some larger policy, a policy not necessarily apparent when the troubling case is first read. Third, the lawyer must show that the larger policy, when applied to the present dispute, produces a result consistent with the desired conclusion.

A diagram and several examples show how troubling cases can be reconciled. Assume that a student represents the seller in a case. Confronting the student is a case with similar facts, call them facts A, B, and C, in which the buyer prevailed. This is an apparently contradictory case. Not coincidentally, it is also the case that opposing counsel will use to build an analogy. To reconcile this troubling case, the student must first distinguish it on the facts. The student must attempt to show that the facts of the present problem are not A, B, and C, but rather A1, B1, and C1; similar facts, but significantly different. Once the facts have been distinguished, the student must identify some larger policy or rule that can be applied both to facts A, B, and C, and to facts A1, B1, and C1. Applying that larger policy or rule to the present set of facts and to the earlier set of facts should lead to exactly opposite results. The following diagram illustrates this process:

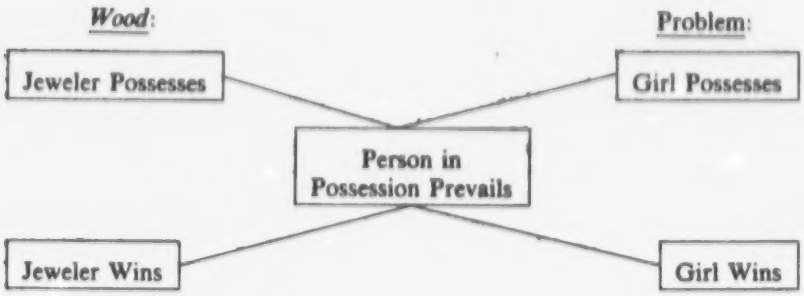


An example shows how helpful a chart like this can be. Assume the following facts:

> A little girl found a pretty stone. She did not know what it was. She showed it to a jeweler who was walking down the street. The jeweler also did not know what the stone was. "I'll give you a dollar for it, if you bring it to my shop after lunch," the jeweler said. The girl quickly agreed. Before she went to the jeweler's shop, she learned that the stone was a valuable, uncut diamond. When the girl did not bring the stone, the jeweler sued.

In *Wood v. Boynton*,[114] the case upon which this hypothetical is based, the jeweler prevailed. Assume here, that the student represents the girl. How can *Wood* be reconciled, that is, used to help the girl?

The diagram shows how easy it is. First, the student must distinguish *Wood*'s facts from the problem's facts. In *Wood*, the jeweler possessed the stone, and the girl had to sue the jeweler. In the problem, the girl possesses the stone, and the jeweler must sue the girl. Once the facts have been distinguished, a larger policy or rule can be seen. Possession itself plays a tremendously important role in mistake cases. A specific policy may be stated: "In cases of mutual mistake, the person in possession should prevail." Quite apart from whether this rule or policy is correct, note how it fits into the diagram:



In *Wood*, that policy led to the jeweler winning. In the present problem, that policy leads to the girl winning. *Wood* has been reconciled to support the girl's claim, although, initially, it appeared flatly contradictory.

Another technique for finding a helpful policy in an apparently

114. 64 Wis. 265, 25 N.W. 42 (1885).

contrary case is similar to the process described in connection with the analogies (fourth skill) concept of the "lowest common denominator of fact." In connection with this approach, lawyers must look for the "lowest common denominator of policy." The process is straightforward. The facts and the desired conclusion in the problem can be written out in a short list.[115] Then, next to that first list, one places a second list, a list of the facts and conclusion in a helpful case. Finally, next to these two lists, one places a list of the facts and conclusion of the apparently harmful case.

The lists prepared for the Uncle David/Jennifer dispute described above might look like this:

Present Problem	*Kirksey*	*Hamer*
Relatives by marriage	Relatives by marriage	Blood relatives
Privately made promise	Privately made promise	Public promise
No outsiders affected	No outsiders affected	Outsider affected
Short term	Short term	Long term
Man/woman	Man/woman	Man/man
Promisor alive	Promisor alive	Promisor dead
Money	Land	Money
No children	Children	No children
Older/younger	Same age	Older/younger

After preparing the lists, the advocate looks for a single policy statement that is consistent with all three, a policy statement that can be added to the bottom of each list. Of course, when formulating these policy statements, the respective lawyers focus on the parts of the lists where the problem itself lines up with the helpful case. Jennifer's lawyers would look particularly at the bottom of the foregoing lists, because *Hamer* helps them; Uncle David's lawyers would look particularly at the top, because *Kirksey* helps them. After analyzing the foregoing lists, Uncle David's lawyers might formulate the following policy statement and argument based on it. Note carefully how this policy moves outside of the province of law and lawyer:

> The policy of the law is that courts will interfere with family-type activities only if the cloak of family has been thrown off, or if the activities themselves violate the law or injure outsiders. The family unit is too sacred to allow casual interference by courts.

115. Professor Landau has suggested a similar process of using charts or lists to develop legal theories. *See* Landau, *Logic for Lawyers*, 13 PAC. L.J. 59, 83-89 (1981).

> *Kirksey* reflects that policy. In that case, a privately-made family promise was not enforced. That nonenforcement had no negative effect on outsiders. Likewise in *Hamer*. The court in that case enforced a promise because nonenforcement would have had a dramatic negative effect on an outsider. In addition, the promise had been publicly made, outside of the strict confines of the family and the death of the promiser had itself disrupted the family unit. In the present situation, Uncle David privately made a family-type promise to Jennifer. The nonenforcement of this promise will have no effect on outsiders. Because the law should only interfere in family activities in very unusual circumstances, none of which exist here, this promise should not be enforced.

Uncle David's lawyers have now reconciled *Kirksey* and *Hamer*. More importantly, they have deprived Jennifer's lawyers of their strongest case.

In the introduction to this discussion of the skill of using apparent contradiction, it was noted that use of this skill, though extraordinarily difficult, pays enormous rewards. Indeed, it does. Reconciling cases, rather than merely distinguishing them, takes away the opponent's strongest point. It turns the opponent's strength against itself. But the difficulty aspect of this skill cannot pass unnoticed. How can we teach students to do something that is extraordinarily difficult, something that most lawyers never learn? That question introduces at least two others. How can law teachers, in class, help students learn any of the skills described herein, or different skills that teachers may wish to emphasize? Furthermore, once students learn the individual skills, how can these students be taught in class to combine the skills into unified and persuasive legal arguments? It is to some aspects of these questions, principally involving classroom instruction in skills, that this paper now turns.

III. Classroom Instruction In Skills Training: Some Tentative Thoughts

A teacher's mere description to students of skills sought to be taught in law school classes will generate immediate positive results. Students, who quite often are, and perhaps should be, somewhat confused regarding what teachers are trying to do in connection with substantive components of given courses,[116] will quickly grab tight hold

116. The basic theory of the "case method" or the "Socratic method" of instruction can be easily stated:

> To summarize, the reasons that I would urge for the adoption of the case system of instruction are, first, that law, like other applied sciences, should be studied in its application if one is to acquire a working knowledge thereof; . . .

of carefully defined skills. Furthermore, because the students will

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> third, that it is by the study of cases that one is to acquire the power of legal reasoning, discrimination and judgment, qualities indispensable to the practicing lawyer; fourth, that the study of cases best develops the power to analyze and to state clearly and concisely a complicated state of facts, a power which, in no small degree, distinguishes the good from the poor or indifferent lawyer; fifth, that the system, because of the study of fundamental principles, avoids the danger of producing a mere case lawyer, while it furnishes, because the principles are studied in their application to facts, an effectual preventive of any tendency to mere academic learning . . . .

Keener, *The Inductive Method in Legal Education*, 17 REP. A.B.A. 473, 488-89 (1894), *quoted in* Young, *Formulating a Theory for Legal Education: Thoughts on Assuming a Deanship*, 5 HAMLINE L. REV. 1, 69 (1981). Professor Jones provides a similar perspective when he argues that the "basic assumption of the case method is, I take it, that the case method requires the law student to use legal sources in a manner which resembles as closely as possible the use which lawyers make of the same sources in courts and law offices." Jones, *Notes on the Teaching of Legal Method*, 1 J. LEGAL EDUC. 13, 18 (1948).

Many writers have discussed the value of "rigor" in law school classrooms. Many favor it. Austin Scott wrote to his parents about one of his teachers:

> Prof. Beale is rather sarcastic and points out in no gentle terms the absurdity of the answers given. "He has a dampening effect on my conversational ability" as one of the fellows puts it.

A. SCOTT, LETTERS FROM A LAW STUDENT TO HIS FAMILY 1906-1908 7 (1974). Another writer, coining a phrase, said that teachers must at all times be an "intellectual irritant." Le Dain, *The Theory and Practice of Legal Education*, 7 MCGILL L.J. 192, 200 (1960). Dean Carrington draws a graphic analogy to the method of a law school classroom in a description of Mark Twain's *Life on the Mississippi*:

> Perhaps because of similarities in their aspirations and in the intricacy and inconstancy of the material with which they work, the teaching methods used to train pilots are not unlike those familiar in the training of lawyers. Horace Bixby, Twain's teacher, could be described as a devotee of the Socratic method. He asked Twain a lot of questions and commented forcefully when his responses were inadequate. When Twain missed his first question, Bixby denounced him as the "stupidest dunderhead I ever saw or heard of." On another occasion, Bixby summed up his appraisal of Twain: "taking you by and large, you do seem to be more kinds of an ass than any creature I ever saw before." Twain reciprocated these hard lessons and harsh comments with unspoken hostility and often when discouraged he would withdraw, manifesting the familiar traits of alienation. Yet beneath the veneer of authoritarian abuse and cringing enmity, there was between master and cub a bond of shared purpose which most law teachers would envy. Twain at times recognized that Bixby's harshness reflected high standards and high hopes for Twain.
>
> Twain, more than most professional students, read the subscript to the pedagogical dialogue. He recognized Bixby not merely as a hard taskmaster, but also as an example of what a pilot is and can be. Twain knew that it was the character and values of Bixby that he had learned first and that he would forget last. It was Bixby's example, not his preachments or his manners, that operated most powerfully. Bixby seemed unaware of this effect and, indeed, it is a force so powerful that teachers can seldom control it.

Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 225 (1984) (footnotes omitted). Professor Allen makes a similar point:

> A second set of student attitudes, springing from the hedonism of modern life, has had an even clearer impact on university education. There has developed a widely held conviction in our culture that individuals possess a kind of

know specifically what the skills are, they will recognize those skills

> natural right not to experience pain. When pain is felt, the reactions are often indignation and bewilderment. These assumptions manifest themselves in student reactions to the phenomenon of tension in law school education. Tensions can be painful, and they abound in professional training. Many modern students, having been denied the knowledge that tensions may be normal and inevitable incidents of the educational experience, conclude that the pain they feel is abnormal. Pain creates self-doubts, because it is seen as evidence of personal deficiency or of illness. It also produces resentment against the institution and the educational process that engender it.
>
> Closely related is the invincible conviction of many students that learning under pressure is not only inefficient and difficult but also impossible. Perhaps this conviction underlies the feeling of some students that being called on in class and subjected to challenge by the instructor and classmates is somehow undignified and demeaning. If it is assumed that the tensions of classroom interrogation disqualify the exchange from serving as a learning experience, it may well be seen simply as aggression against personality and comfort. These beliefs are so deeply entrenched that they withstand convincing demonstration to the contrary. Surely not only history but contemporary experience reveal that profound learning is possible in conditions of considerable pressure and that this is so much the normal mode that pressures at some level, whether engendered internally or externally, may be seen as indispensable conditions of the learning process. When Dr. Samuel Johnson was asked how he came to acquire his command of Latin, he replied: "My master whipped me very well. Without that, Sir, I should have done nothing."
>
> One scarcely needs to espouse the revival of corporal punishment as a teaching device to protest the educational ideology that has pervaded the lives of many university students. The "learning is fun" ideologues have slain their tens of thousands. Learning, in fact, is pain, at least in those aspects of it concerned with the indispensable discipline of basic drill. Paradoxically, learning confers profound satisfactions, and the intellectual life is a kind of play. The pleasures, however, cannot be achieved without experiencing the pains. Modern technology has not discovered a short-cut to Parnassus.

Allen, *The New Anti-Intellectualism in American Legal Education*, 28 MERCER L. REV. 447, 459-60 (1977) (footnote omitted); *See* Allen, *Mr. Justice Holmes and "The Life of the Mind,"* 52 B.U.L. REV. 229, 234 (1972). "One of the modern ideas most subversive to 'the life of the mind' is the notion that 'learning is fun.' It would be closer to the mark to say that 'learning is pain.' " *Id.*

Some writers favor retaining the traditional law classroom method, but with modifications. Professor Watson, for example, makes a number of suggestions for modifying the Socratic method. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CINN. L. REV. 91, 145-47 (1968). In particular, he argues for a quid pro quo in class, namely, frequent positive response, especially toward the beginning of the term. Professor Watson also suggests that teachers should acknowledge the existence of stress and should encourage group camaraderie. *Id.* at 146. Finally, he suggests that teachers should acknowledge that they too experienced stress in similar situations. *Id.* at 147. I accomplish this by frequently refering to the Socratic ordeal I personally experienced in the classes of a man I describe in class as the "Perfect Master"—Bruce L. Bower of Winston & Strawn in Chicago. Students who hear me recount my own repeated intellectual humblings at the hands of the Perfect Master gain renewed confidence in their own ability. *See* Newell. *Ten Survival Suggestions for Rookie Law Teachers*, 33 J. LEGAL EDUC. 693 (1983).

Criticisms of the traditional method of legal analysis are legion; I describe only a few representative examples. Professor Watson is extremely critical of what he describes as the "holy mission [of teachers] to root out all ill-conceived and unreasoned attitudes in their stu-

when they see cases or teachers display them. These facts alone indi-

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dents." Watson, *supra*, at 109. He shys away from specifically using the word "sadists" to describe first year law teachers, but it is clear that he believes the label would fit. *Id.* Professor Watson insists that even well-meaning teachers can do great psychological damage to students. *Id.* at 119-22. Professor Shaffer and Attorney-Psychologist Redmount, however, do not shy away from the term sadism. Shaffer & Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 190, 193 (1976). Doctor Redmount is one of the harshest critics of the Socratic method. Redmount, *Law Learning, Teacher-Student Relations, and the Legal Profession*, 59 WASH. U.L.Q. 853, 872-73 (1981).

Other critics of the method have used graphic arguments to emphasize their positions. *See, e.g.*, Dillon, *Paper Chase and the Socratic Method of Teaching Law*, 30 J. LEGAL EDUC. 529 (1980). Professor Dillon argues that the notorious Professor Kingsfield did not employ anything remotely resembling the Socratic method of education. *Id.* Dean Redlich observes that "quick repartees to student questions—the dominant professorial style in the classroom—may characterize a great Socratic teacher, while slow and studied considerations of problems signals a skilled attorney." Redlich, *Law Schools as Institutional Teachers of Professional Responsibility*, 34 J. LEGAL EDUC. 215, 218 (1984); *see* McDowell, *The Dilemma of a (Law) Teacher*, 52 B.U.L. REV. 247, 252 (1972). Professor Mooney presents a similar criticism:

> A "good legal education" consists of a primitive form of brainwashing. This is known as teaching the law student to "think like a lawyer." The first step is the Socratic creation of confusion in the subject's mind, coupled with as much terror as can be institutionally induced. All he has previously learned is scorned and calumnified as useless, wrong and "not analytical," a strange form of non-literature is held up as the only object worthy of intellectual emulation, and the appellate cadavers of yesterday's private lawsuits are dissected with the high seriousness normally reserved for backyard gossip.
>
> The second step involves a highly prized teaching experience. To wit: The day the first-year class gestalts into our world of "law" by perceiving the conceptual wonders of "possession," "duty," "offer-acceptance-consideration," or "cause of action." Successive steps build a new intellectual personality for each student who survives the essay testing process by proving to our satisfaction he has learned how to think like a lawyer and put it down in writing under tremendous psychological pressure.

Mooney, *The Media is the Message*, 21 U. MIAMI L. REV. 507, 509 (1967). The list goes on and on. Dean Sandalow characterizes such techniques as "barbarities." Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 169 (1984). Professor Kennedy castigates this rigorous technique with a string of derogatory terms, the least damning of which is "authoritarian." Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 612 (1982).

A few writers have focused specifically on the stress purportedly caused by the use of the Socratic method. These writers' reactions are mixed. Commentators Packer and Ehrlich, criticizing traditional first year law courses, focus on "psychic damage" that they allegedly cause. H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 30 (1972). Notwithstanding its shortcomings, however, the authors conclude that first year legal education is, for the most part, an "exciting, agonizing, challenging, intellectually eye-opening experience." *Id. See* Taylor, *Law School Stress and the "Déformation Professionelle,"* 27 J. LEGAL EDUC. 251 (1975). An interesting student comment reports on a survey of first semester law students at the University of Wisconsin. Comment, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201. The comment traces anxiety in first semester students and attributes it to four causes, only one of which involves classroom teaching style: (1) high expectations—everyone in law school was the "smart kid" in college and, of necessity, that will not remain so; (2) the Socratic method; (3) the subject matter and method of study—because legal ideas are new, students do not know how to study; and, (4) importance of grades. *Id.* at 1202-10.

cate that teachers who have carefully defined the skills they wish to teach have accomplished more than many of their colleagues.

Indeed, however, considerably more can be accomplished in skills training if teachers are willing to engage in the mundane process of "drill." Drill is the practice by which students learn from doing something over and over again.[117] It is a concept borrowed from athletic practice fields, from performing artists' studios, and from the grade schools. Athletes learn skills, not by talking about them, or by doing them once or twice, but by doing the same (or a very similar) exercise over and over again.[118] Performing artists do not just walk on stage after quickly looking at a script or a score. First come years of repetitive drill in highly technical exercises. Small children do not learn difficult skills—long division, for example—at recess. Teachers teach these skills by providing endless exercises. Law students, particularly beginning law students, learn skills best in a similar way. They learn by doing, over and over again.[119]

Without question, many legal educators will have considerable difficulty accepting that drill has a place in substantive law classes. That difficulty no doubt arises, however, not from unwillingness to accept the proposition that students can best learn skills by drill, but from unwillingness to take class time away from substantive concepts and give it over to skills training. Fortunately, methods exist by which teachers can simultaneously teach substance and skills. Some of these methods have been discussed earlier. For example, teaching students how to use precise statutory language forces students to learn the substantive component of the statute. Practicing creating synthesis or using policy arguments is not only skills training; it is equally as much training in substance. Other methods of combining skills training with the development of substantive knowledge pervade any class conducted with a question-answer format. It is in this context that three specific techniques of combining skills training and substantive

117. Although the general rule is that practice makes perfect, drilling can become too much of a good thing. Research indicates that athletic coaches can impede motor skills by overteaching. *See, e.g.*, R. SUIN, PSYCHOLOGY IN SPORTS: METHODS AND APPLICATIONS 20 (1969). To avoid this pitfall where athletes are concerned, the author suggests the insertion of novelty and interest into practice sessions. *Id.* at 21.

118. Athletic coaches attempt to maximize competition performance not only through drill but also by utilizing a technique known as "transfer." The idea is to replicate competition conditions as closely as possible during practice so that an athlete can optimize the "transfer" of his practice performances to actual competition. This technique, more forward looking than the drill, could also be useful in the law school setting. The hurdle is, of course, determining the end—or competition—for which optimal performance is desired. *Id.* at 20, 30.

119. *See infra* note 121.

law learning deserve special mention. All three may be appropriate for all teachers.

A. *The Syllabus As A Tool For Combining Skills Training With Substantive Learning*

Over forty years ago, one of legal education's greatest figures, Karl Llewellyn, argued that students need a teaching syllabus.[120] As virtually any teacher will admit, however, Professor Llewellyn's call has gone generally unheeded. For most teachers, the syllabus contains merely lists of cases, statutes, and assigned readings for given days or periods of time. The syllabus makes no reference to skills. Most teachers' failure to use the syllabus as a tool for skills training causes them to neglect what may well be one of the best mechanisms for combining substantive law learning with skills training.

Consider how a syllabus might look if it contained, in addition to references to substantive law, repeated references to what could be called "skills exercises."[121] The syllabus assignment for a day early in

120. *See* Llewellyn, *The Crafts of Law Re-valued*, 15 ROCKY MTN. L. REV. 1 (1942).

121. These exercises or "drills" provide students with what some educational psychologists call "distributed practice." Distributed practice refers to the manner in which students rehearse the task performance. In distributed practice, brief rest periods are interspersed among task trials. The opposite of distributed practice is massed practice, in which students devote a single time period to the acquisition of a new skill. Cramming for an examination is one example of massed practice. Underwood demonstrated that although massed practice can improve performance over a brief time period, it was also associated with a rapid decline in performance over a longer period. Underwood, *Ten Years of Massed Practice on Distributed Practice*, 68 PSYCHOLOGY REV. 229 (1961). A major advantage of distributed practice is that less fatigue is generated to hinder learning during the task rehearsal. Digman and De Cecco presented data supporting the beneficial effects of distributed practice over massed practice. Digman, *Growth of a Motor Skill As a Function of Distribution of Practice*, 57 J. EXPERIMENTAL PSYCHOLOGY 310 (1959). De Cecco also noted that distributed practice necessitates an increase in the total practice time, which may be a detrimental factor when time is of the essence. J. DE CECCO, THE PSYCHOLOGY OF LEARNING AND INSTRUCTION (1968).

Distributed practice was used in the integrative teaching method by constructing a set of vignettes requiring use of legal concepts. Students received a set of vignettes for each instructional unit, and worked on these problems upon completion of each unit. Thus, students practiced the application of legal concepts twice weekly throughout the quarter, as opposed to a single practice session before a course examination. Blackburn & Niedzwiedz, *Do Teaching Methods Matter? A Field Study of an Integrative Teaching Technique*, 18 AM. BUS. L.J. 525, 527 n.5 (1981). Several legal educators described a different rationale for practice exercises and drill:

> The lesson from modern production analysis is that machinery designed to do many things at once or indiscriminately can commonly be made more effective if the needed operations are broken down and tackled one by one. The lesson from general pedagogy is that to master a skill the less gifted student must have sustained practice in that skill; not only practice, but repetitive uninterrupted practice on that particular skill, until it is a part of him. Another lesson from pedagogy is that it helps a learner much if he is told what he is supposed to do so as to guide his efforts; and that it helps him if the cumulative

the term might look like this:

1. Read and Brief:
   a. *A v. B*
   b. *C v. D*
   c. [Pertinent Statutory Sections]
2. Skills Exercises:
   a. Assume you represent A in *A v. B*. Prepare a statement of facts.
   b. Assume you represent B in *A v. B*. Prepare a statement of facts.

The skills component of a different day's assignment, also early in the term, might look like this:

2. Skills Exercises:
   a. Assume you represent E in *E v. F* [an assigned case]. Using the Uniform Commercial Code (U.C.C.), construct a statutory argument for your client.
   b. Assume you represent F in *E v.F*. Using the U.C.C., construct a statutory argument for your client.

As the semester progressed, the skills exercises on the syllabus

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> things which he learns by practicing them one by one are written down in sequence (in "slogan") and in orderly arrangement (in syllabus) so that he may have at hand a reminder of what has gone before and a picture of what it all comes to and of how one piece of it fits with another and with the whole. The lesson from the case system of the classic days is that clear guiding threads, simple, explicit, and few, tremendously help case-instruction to infiltrate its values, reliably, to every student who should pass a course. The lesson from our bluebooks is that with regard to half or more of our graduates those indirect values which everyone of us recognizes as the major value to him of his own law school days are no longer being communicated throughout our classes in craftsmanlike adequacy; and that we must take steps.

The Place of Skills in Legal Education, 45 COLUM. L. REV. 345, 356-57 (1945). Professor Kennedy also suggests something similar to my written exercises as a method for teaching skills:

> To teach the repetitive skills of legal analysis effectively, one would have to isolate the general procedures that make them up and then devise large numbers of actual and doctrinal hypotheticals with which students could practice those skills, knowing what they were doing, and learning in every single case their performance was good or bad. As legal education now works, on the other hand, students do exercises designed to discover what the "correct solution" to a legal problem might be; those exercises are treated as unrelated to one another; and students receive no feedback at all except a grade on a single examination at the end of the course. Students generally experience these grades as almost totally arbitrary— unrelated to how much you worked, how much you liked the subject, how much you thought you understood going into the exam, and what you thought about the class and the teacher.

Kennedy, *Legal Education and the Reproduction of Hierarchy*, 33 J. LEGAL EDUC. 591, 600 (1983).

could become increasingly more difficult. For example, in the middle of the term, the syllabus could propose these exercises:

> a. Assume you represent I, the losing side, in *I v. J* [an assigned case]. Using techniques of synthesis, analogy, and reconciliation of apparent contradiction, create an argument for your client.
>
> b. Use the Restatement (Second) of Contracts to create an argument for I in *I v. J*. Then use the U.C.C. to create an argument for J in the same case.

Near the end of the term, the course syllabus could ask students to combine all of the skills emphasized in the course. For example:

> a. Assume you represent K, the losing side, in *K v. L* [an assigned case]. Using all of the skills learned in this course, construct an argument for your client.

The teacher could then use the last week or so of class to move students out of a strict advocacy setting:

> a. Assume you are the judge deciding *M v. N*. Decide who ought to prevail in this dispute. Then, using all of the skills learned in the course, construct an argument supporting that decision.

This discussion has suggested that a syllabus containing skills exercises could be useful to teachers who wish to combine substantive law learning with skills training, but do not wish to spend too much actual class time on skills. How, then, can "skills exercises" like the ones just described be useful in class discussion? One possible way is to place disproportionate class emphasis on the skills exercises early in the term and then gradually to diminish class discussion of them. For example, early class sessions might spend as much as half of the class period on several of the assigned exercises. Perhaps a quarter of the way into the course, however, only one of the assigned exercises would be discussed in class, and only during every other session. Halfway through the course, the exercises could be dealt with in class on an occasional basis, perhaps every third or fourth session. As long as students realize that a significant possibility exists that they will be called upon for given exercises, they will probably continue to do them, even if class discussion is infrequent. By the end of the term, students, hopefully, will have seen the inherent value of the exercises, and class discussion of them could be eliminated almost entirely.

A last point, an important one, must be made about skills exercises such as those just described. Recall that the pattern of exercises established for the full term was this: early assignments involved only one skill, middle assignments involved several, and, by the end of the

term, the exercises asked students to combine all of the skills. The last exercises, of course, provide students with a truly daunting task. How then to help them?

B. *A Recipe for the Construction of Legal Arguments*

This paper began with a criticism of legal educators and lawyers who speak frequently of the skill of "legal analysis," but fail to define the component parts of that skill. The skill of legal analysis, it has been argued herein, must be divided up into different skills in order to help students learn it effectively. Ironically, we now turn to a discussion of methods for teaching students how to combine those skills, something that seems, superficially, to contradict what has come before. In fact, however, no such contradiction exists. This combining involves a careful mixing of different things. Conscious decisions create the resulting blend.

Without doubt, most students need considerable help in learning how to organize large scale legal arguments. Only a tiny handful of law students possess the natural ability to construct persuasive written legal arguments. These students create splendid results using only the statutes, cases, and their own intuitive skill and imagination. Like great chefs, these students have a "feel" for the correct ingredients, the correct proportions, the correct order of use. The vast majority of students, however, like the vast majority of cooks, simply lack the natural and intuitive ability needed for such results. The work they produce lacks cohesiveness. It looks like a child's concept of "homemade dessert." One effective way of helping students learn how to combine the various skills requires the teacher to play, in effect, the master chef of legal argumentation, the Julia Child of disputes. The teacher, using his or her own wealth of experience, provides a set pattern or formula, a "recipe," that students can use to organize their own work.

Described below is one recipe useful in the creation of unified legal arguments. This recipe directly reflects the six skills described in this paper. Before the recipe itself is described, however, an important point must be reemphasized. As noted at the outset, one of the principal purposes of this paper is to serve as a model useful to other teachers who wish to prepare similar skills papers for their own students. That purpose applies with particular importance to the recipe about to be described. Many similar recipes exist, some considerably more elaborate. For example, books on appellate advocacy, such as

the one by Professor Re,[122] contain elaborate formats for organizing arguments. Some of these other recipes might be much more useful to experienced practitioners than the one proposed herein. The phrase "experienced practitioners" explains the value of the proposed recipe. Students, particularly first year students, are not experienced practitioners. They should not be thrown headlong into things too difficult for them to do. The field of cooking provides an excellent example. Countless kitchen shelves contain copies of one of the greatest of all cookbooks, The Escoffier Cook Book. But, in most of these kitchens, that book remains essentially unused. The recipes are too difficult to follow, and they require knowledge of techniques that most household cooks have not learned.

The recipe described herein is one for beginners who are just learning how to construct legal arguments. It closely tracks a similar recipe devised by Professor Llewellyn—identify the issues, frame the issues and facts in favorable ways, apply legal principles based on statutes and case synthesis, use analogies, make arguments based on situation-sense and reason (herein called "policy") and then distinguish (herein "reconcile") apparently unfavorable material.[123] The present recipe is this:

A "Recipe" For the Construction of Legal Arguments
(Summary)

I. "Introduction"
II. "Facts"
III. "Applicable Statutes Support the Stated Answer"
IV. "A Large Body of Case Law Also Supports the Stated Answer"
V. "The Decision in a Factually Similar Case Lends Additional Support"
VI. "A Consistent Underlying Policy is Reflected in All of the Cases and Statutes Previously Discussed"
VII. "Finally, This Underlying Policy Shows That Apparently Contradictory Cases Support the Stated Answer"
VIII. "Conclusion"

I. "Introduction"
  A. Begin with a brief statement of the "question presented." Because you have not yet provided any facts or names, and

122. E. RE, BRIEF WRITING AND ORAL ARGUMENT (5th ed. 1983).
123. I am indebted to Professor Charles Kelso of McGeorge Law School for this formulation of Professor Llewellyn's "recipe."

the reader may be unfamiliar with the facts, the question presented should be very general in nature. Phrase the question so as to make its answer inevitable, and, of course, supportive of the desired conclusion. Then give a brief, general summary of the desired conclusion, that is, the "answer." After the answer has been articulated, a summary of the argument's format, in short, a "roadmap," should be provided.

B. Note: Multi-issue Arguments, that is, arguments which must address several seemingly unrelated legal issues, are discussed at the end of this recipe.

II. "Facts" [The First Skill]

A. Describe the facts so as to create support for the desired conclusion. The statement of facts must set up the legal argument to follow.

B. Note: The statement of facts should be as brief as possible, certainly no more than ten percent of the total length of the argument. Highlight favorable facts. Explain troubling facts. Nevertheless, the statement should appear completely objective.

III. "Applicable Statutes Support the Stated Conclusion" [The Second Skill]

A. Describe applicable statutes (or quasi-statutes), and then quickly apply them to the facts in such a way as to provide support for the desired conclusion.

B. Note: It may be necessary to introduce discussion of the statutes with a one or two sentence explanation of why they apply. For example, "Because this problem involves the sale of goods, the U.C.C. governs;" or, "Courts in this state [circuit] often look to the Restatement for help in resolving legal disputes. [Cite]." The facts of the problem should be woven directly into the specific language of the statute.

IV. "A Large Body of Case Law Also Supports the Stated Conclusion" [The Third Skill]

A. This section should contain a comprehensive but concise synthesis of many cases and authorites, which points toward the desired conclusion. Formulate from the authorities one or more related legal propositions consistent with the desired conclusion.

B. Note: This part of the argument should not contain mere seriatum discussion of individual cases, a common error. Rather, it should consist of a single legal proposition fol-

lowed by a list and brief description of supportive case authority.

V. "The Decision in a Factually Similar Case Lends Additional Support" [The Fourth Skill]

A. At this point in the argument, you should undertake an extended discussion of the facts of one or two cases and a demonstration of why those facts are analogous to the facts of the problem. The factual analogies should be as elaborate as possible. Short analogies, two or three sentences long, will not be sufficient. Next, show that the holdings of the cases just described should be applicable to the problem, and that those holdings require a result consistent with the desired conclusion.

B. Note: Cases discussed in this section could easily be included in the synthesis section. It may create a stronger impact, however, if the reader first encounters the analogized cases in this section.

VI. "A Consistent Underlying Policy is Reflected in All of the Cases and Statutes Previously Discussed" [The Fifth Skill]

A. Demonstrate that some larger policy (which supports the desired conclusion) explains the cases and statutes that you have described.

B. Note: It must be recalled that a policy statement must encompass something larger than mere reiteration of the specific rule or holding of a pertinent case. Consequently, this part of the argument probably should make reference to a different legal rule or principle which the same policy supports. If possible, that rule or principle should be one governing a different part of a multipart argument. A policy is something that is of interest to lay people as well as lawyers.

VII. "Finally, This Underlying Policy Shows That Apparently Contradictory Cases Support the Desired Conclusion" [The Sixth Skill]

A. Include reference to one or more cases that apparently contradict the desired conclusion. This will maximize the argument's persuasiveness. These contrary cases should not be "distinguished," that is, shown to be inapplicable. Rather, they should be "reconciled," shown to support the desired conclusion.

B. Note: Apparently contradictory cases can be used by demonstrating that they, together with helpful cases, stand for a

larger proposition of law. Frequently, the policy just described provides the tool for reconciling these cases.

VIII. "Conclusion"

A. End the argument with a carefully constructed conclusion, not merely a rote statement such as, "For the reasons stated herein . . . ." The conclusion is the last thing the reader sees before making a decision. It should leave a good, sound impression.

B. Note: The conclusion might begin with a reiteration of the argument's "roadmap." This reminds the reader of what has come before. The conclusion might end with a paraphrase of the "question presented" and the "answer." This time, rather than stating the issue in a general fashion, as was done in the introduction, the writer should weave specific facts of the problem into the legal conclusion.

The notes to the recipe's introduction suggest that a somewhat different format must be used if the problem presents two or more distinct legal issues. Multi-issue problems are the bane of most lawyers and law students. Readers of the resultant arguments usually feel like they are falling down the stairs. They trip over abrupt discontinuities between the different parts of the argument. Fortunately, a modification of the present recipe may be able to deal with such problems.

Frequently, careful students and lawyers will be able to identify a single policy that lies behind the desired result on all or many of the specific (and apparently unrelated) legal issues in dispute. For example, in contract law, a policy favoring laissez-faire economics might well lend support to the desired result on all of the issues. This one policy could then be used to unify a large and otherwise disjointed series of discussions of narrow issues. The recipe for a multi-issue argument might look like this:

> Begin the argument with a statement that the several narrow legal questions at issue actually reflect different facets of a larger question of policy. Draw case law and statutory support for the policy from the whole field of law involved, not merely from materials dealing with the narrow issues. This is a critical idea. It allows an argument to build on authoritative case law even if courts in the pertinent jurisdiction have not addressed the specific narrow issues. After the argument has established the value of the larger policy, then, and only then, should it break down and deal with the specific issues. Use the basic recipe for dealing with each of the narrow issues. Of course, the policy portions of

each separate part of the total argument will echo each other. Finally, close the argument with a recap of the larger policy discussion.

Few experienced legal educators will doubt that beginning students who learn to construct legal arguments by following a recipe—whether it be the one just described or a different one designed by a different teacher—will do better work than students who learn to construct such arguments merely by trial and error. That, however, raises an intriguing question: what should the teacher, the master chef, do when students fail to work carefully, when students do sloppy or otherwise poor work? Should the teacher play the role of Julia Child, kindly and frazzled? Or should some other role be considered?

B. *The Law Teacher As Coach*

A recurring image of law teachers exists in the popular imagination. It is not, however, that of the teacher as Julia Child. Most lay people and beginning law students visualize something completely different when they think of law teachers. They see individuals of ruthless determination and relentless demands—humorless, uncompromising. Of course, anyone familiar with modern legal education knows that very few such teachers now exist. The dominant mode involves conciliation rather than confrontation. But troubling thoughts on this subject ripple through the halls at many schools. So many great teachers of the past were indeed monsters, or, better said, carefully cultivated a monstrous image among students. Furthermore, as many present teachers think of their own most memorable teachers, they usually do not think of teachers who engaged them in gentle pleasantries but of their most demanding mentors. How can it be that this particular image of the law teacher maintains such a powerful grip? Perhaps the law teacher's role as skills trainer provides the answer. Must skills be taught—at least very hard skills—in an intensely rigorous setting? With that question, suddenly, the link is made, the connection seen. Law teachers teach skills. Coaches teach skills. Great coaches often project images of ruthless determination and relentless demands.[124] Did their role as skills trainers lead great law teachers of the past to imitate coaches?

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124. So pervasive is this image of the athletic coach that each reader is likely to think of different coaches who are or were known as both harsh taskmasters and winners. Names that might commonly come to mind include: collegiate coaches Bobby Knight (Indiana basketball), Woody Hayes, and Paul "Bear" Bryant (Ohio State and Alabama football, respectively), professional football coaches Vince Lombardi (whose legendary career at Green Bay is the modern paradigm of this type of coaching), and Mike Ditka (Chicago coach whose team won the most recent Superbowl). Along with Lombardi, the all-time "consensus" list of

The link between law teachers and coaches has not completely escaped attention. Professor Hornstein alludes to the idea of law teachers as "gym instructors."[125] Professor White compares the process of learning to be a lawyer to, among other things, "learning to swim, to sail, to ski . . . ."[126] Professor Beveridge links lawyers' skills to fencing.[127] The most graphic link between law teachers and coaches, however, resides in a great teacher's extended analysis of classroom legal instruction.[128] In 1960, Professor Peairs of Boston College wrote:

> And with all this, I must repeat that the sarcastic, the ill-mannered, even the ill-tempered teacher is not necessarily a bad teacher. The top-blowers I have mentioned above were all, I think, very good teachers. The proof of the process is in what remains after memory has failed, and I remember best what was said on the retirement of a great coach (I never made his first string) at my college: "The most lasting rewards of a teacher are the affection and acclaim of his pupils" (citing the beeline which "Art's boys" always make to see him whenever they return to the campus). "This despite the fact that Art, to their faces or in their hearing, never made a kind remark about any of them—His sole aim was to put iron in their veins and backbones and courage in their hearts. He is a natural master of human deflation."[129]

In a different part of the same essay, Professor Peairs again touched on the same point, this time not explicitly, but by drawing a picture of a person nowadays seen more often on the athletic field than in the law classroom:

> There remains the question of the atmosphere to be maintained in the classroom: intense or relaxed? fearful, apprehensive, or unconcerned? concentrated, eager, or indifferent? A major section of critical opinion has, over the years, contended that it should be the latter, relaxed and unconcerned, and has even advanced the improbable corollary, that this classroom atmosphere is related to

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"tough" football coaches would probably include Notre Dame's Knute Rockne, and the original owner/coach of the Chicago Bears, George Halas.

Ironically, ruthless demands could be misplaced in an athletic setting, at least where the athletes are students. Coaches who goad pupils into states of extreme anxiety may observe a corresponding decrease in performance. In complex tasks, that is, those tasks containing a large number of competing response tendencies, studies indicate that the preformance of high-anxious subjects is inferior to that of low-anxious subjects. Carron, *Motor Performance Under Stress*, in CONTEMPORARY READINGS IN SPORT PSYCHOLOGY 143 (W. Morgan ed. 1976).

125. Hornstein, *The Myth of Legal Reasoning*, 40 MD. L. REV. 338, 339 (1981).

126. White, *The Study of Law as an Intellectual Activity*, 32 J. LEGAL EDUC. 1, 3 (1982).

127. Beveridge, *The Young Laywer and His Beginnings*, in STUDYING LAW 16, 26 (A. Vanderbilt ed. 1945).

128. Peairs, *Essay on the Teaching of Law*, 12 J. LEGAL EDUC. 323 (1960).

129. *Id.* at 369-70 (footnote omittted).

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> the quality of the law taught. This much, as I have indicated, is, of course, a matter of teaching method rather than of attitude, but becomes important here because unless the decision is for a rigorous approach and corresponding atmosphere, the secondary question, of classroom manner, is unlikely to arise. I think I have made my own choice clear on the first question, in favor of high nervous pressure in the classroom, rather than an atmosphere of relaxation and sociability. While I think it is silly to say that a mind is narrowed by learning to make fine, abstract distinctions, I think it is perfectly true that the mind is not likely to be developed by learning to exercise its utmost powers, except under some species or other of pressure. Some students have the drive to supply this pressure from within themselves; but for most, while they are young, the teacher must supply the incentive. Close distinctions cannot be learnt by approximate thinking; and the law does not pay off on near misses. Hence, I believe a Draconian law-school atmosphere is desirable, with this as its theme: "To make our law program so that you will be glad you came, we must make it so that you will be glad when it is over."[130]

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130. *Id.* at 366-67 (footnotes omitted). Other writers have also made the coaching link. Professor Wheaton alludes to the sports concept of "personal best" when he calls for development in students of the "will to do the best that is in them." Wheaton, *Law Teaching and Pragmatism*, 25 GEO. L.J. 338, 349 (1937). This is the most important thing that teachers do, he argues. Professor Watson makes a cryptic allusion to the role a coach plays in the development of a future law student. He discusses the coach's "exhuberant [sic] pursuit" of the young man. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93, 96 (1968). Professor Jones argues that use of an analogy to some familiar area of the beginner's experience is a most effective device in the introduction of a beginner to a new discipline. Jones, *Notes on the Teaching of Legal Method*, 1 J. LEGAL EDUC. 13, 16 (1948). Because so few students share a common educational background, Professor Jones concludes that references to baseball and football are about the only useful analogies. *Id.*

The coaching analogy raises several intriguing points. First, in most modern classes, teachers stand or sit at the front of a room. Rarely, any more, do students stand when they speak. The coaching analogy suggests that teachers perhaps should not stand at the front of the room, but rather, should teach classes from another location. Perhaps students could be asked to face each other, rather than the teachers. Athletes, for instance, do not practice skills while sitting on the gym floor. Works on legal education have generally ignored the topics of standing in class and arrangement of seats. *But see* Slovenko, *Boredom in Legal Education*, 9 CLEV.-MAR. L. REV. 374, 386-87 (1960) (discussing the importance of standing while speaking); Weinstein, *The Integration of Intellect and Feeling in the Study of Law*, 32 J. LEGAL EDUC. 87, 95 (1982) (discussing the importance of the physical configuration of a classroom).

Professor Watson notes that teaching from a rostrum "provides great protection." Watson, *supra*, at 114. This is important, Professor Watson argues, because law teachers want a position from which they can be aggressive, but aggressive in a socially acceptable fashion. *Id.* Other legal educators concur. Shaffer & Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 190, 199 (1976). They argue that the Socratic method is rarely used in law school. "Authority," they claim, "is more important and more prominent than inquiry." *Id.*

My own experience demonstrates how teachers can use large classrooms. At The John

Without doubt, many law teachers will strenuously disagree with

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Marshall Law School in Chicago we have two very large classrooms. Both seat in excess of 120 students at seven long rows of three-person tables. All of my colleagues use the rooms in a normal fashion, with the teacher at the front of the room and the students facing him or her. Before my class sessions begin, however, students in the front half of the room must turn their chairs around and face the back of the room, looking over half of the tables. Tables in the fourth row from the front remain vacant. I stand at either side of the room, switching sides from one day to the next, and use "reserved" space at the ends of the middle row of tables to hold my books. I place my notebook across the backs of two chairs.

The second point raised by the coaching analogy is more subtle. Most teachers encourage students to volunteer in class, even in large classes. A large flurry of hands on any given day indicates responsible students and a good class. For two principal reasons, both of them flowing from the coaching analogy, this practice of encouraging volunteers may be a serious error if teachers wish to concentrate on skills in large first year classes. First, all teachers know that large classes are quickly dominated by a small group of volunteers. Ten to twenty percent of the students in these classes carry the vast bulk of the discussion. Simultaneously, another group of students, perhaps one quarter of the class, never volunteers, regardless of knowledge or interest. The combination of these two factors subverts class as a forum for skills practice because everyone must be involved in skills practice for it to be effective. Professors Watson and Vagts discuss the harm caused by this dominance of a class by an "intellectual elite." Vagts, *The "Other" Case Method: Education for Counting House and Court House Compared*, 28 J. LEGAL EDUC. 403, 419 (1977); Watson, *supra*, at 111.

Many writers have argued that active student participation is an essential part of a case method or Socratic method class. *See, e.g.*, Keeton, *Teaching and Testing for Competence in Law Schools*, 40 MD. L. REV. 203, 218-19 (1981); Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 6 (1951); White, *The Study of Law as an Intellectual Activity*, 32 J. LEGAL EDUC. 1, 9 (1982). Dean Sandalow stresses the importance of class participation: "Participation in a well-run class discussion permits students to overcome fear and to learn by experience that the embarrassment of public error may be compensated by the learning that ensues." Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 169 (1984).

Professor Riesman, in a comparison between legal education and graduate school comments favorably on the encouragement law school educators give a student, even in large classes, "to talk back to his professors . . . with a verve and lack of fear of what might happen to him." Riesman, *Law and Sociology: Recruitment, Training and Colleagueship*, 9 STAN. L. REV. 643, 648 (1957). Dean Carrington also noted the importance of speaking under stress in class:

> One kind of competence might be increased by changes in academic standards. I have in mind the competence of speaking publicly and under stress. One cannot be certain about such matters, but it seems likely that most law schools are now substantially less effective than they were a decade or so ago in regard to their training of students to cope with the stress of exposure to an audience. Indeed, I suspect that many others than myself have responded to student consumerism by coming to tolerate a passivity in classrooms that would have aroused a sense of shame only a few years ago. Students who resent being prodded and challenged in the public arena of the classroom may have taught us teaching habits that disserve them and the clients they hope to serve.
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> While it is sometimes hard for law teachers to face the misgivings and suspicions of those of our students who are too inexperienced to understand, it may help to remember the gratitude of Learned Hand, who said of his mentors:
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> > More years ago than I like now to remember I . . . listened to . . . [and] was dissected by—men all but one of whom are now dead. What I got from them was not alone the Rule in Shelley's case, or what was one's duty to an invited person . . . or what law determined whether a -

Professor Peairs's defense of the value of rigor in law school classrooms, and his link between law teachers and coaches.[131] In fact, in

> contract has been made, or how inadequate was the common law of partnership. . : . From them I learned that it is as craftsmen that we get our satisfactions and our pay. In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none.

Carrington, *The University Law School and Legal Services*, 53 N.Y.U. L. REV. 402, 430 (1978) (quoting L. HAND, THE BILL OF RIGHTS 77 (1958) (footnotes omitted); *see* Mennell, *The Unspoken Challenge: Involving the "Quiet" Student*, 31 J. LEGAL EDUC. 209 (1981).

This brings me to a related point. Professor Watson correctly argues, I believe, that the most serious side effect of using the Socratic method of instruction is panic leading to almost total incapacitation. Watson, *supra*, at 129. He then describes "flight by incapacitation." *Id.* at 130. An extremely common example of this incapacitation involves student unwillingness or inability to participate adequately in class. Although I agree with Professor Watson and others that the Socratic style can have this paralyzing effect, I think that something else also contributes dramatically to this incapacitation. That something else is the conjunction of large classes (most first year classes at most schools are taught in very large sections) and the encouragement of voluntary discussion. The combination of these two factors makes it extremely unlikely that teachers will call upon most students in most first year classes more than once or twice each term. Realizing this, students expend little or no psychological energy conditioning themselves to the perceived agonies of speaking in front of a large critical group. This lack of conditioning leads to incapacitation when students experience the unfamiliar anxiety of being called.

Encouraging voluntary discussion has a second negative effect from a skills perspective. Without doubt, the overall level of classroom preparation in a class with volunteers is lower than the overall level of preparation in a class without volunteers. If the vast majority realizes that a few students will always be prepared and will always volunteer, that vast majority will tend to reduce preparation efforts. Furthermore, in classes where volunteers are called, the nonvolunteer's likelihood of being called dramatically drops. Common sense suggests that most students tend to prepare less for class if they do not anticipate being called. Students cannot develop skills unless they are always prepared.

This raises another issue. Legal educators engage in considerable debate about allowing students permission to "pass" in class, that is, to say that they are unprepared. Dean Redlich criticizes the idea of the "no-hassle" pass, comparing it to what he calls a "no-fault default." Redlich, *Law Schools as Institutional Teachers of Professional Responsibility*, 34 J. LEGAL EDUC. 215, 218 (1984); *see* Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226 (1984); Vernon, *Education for Proficiency: The Continuum*, 33 J. LEGAL EDUC. 559, 568 (1983). Most modern teachers, however, allow students to pass. Perhaps a compromise position is best. A teacher might allow students to submit written pass requests in the teacher's office. Requiring students to come to the teacher's office with a pass request does several positive things. First, it discourages casual requests. Second, it avoids the class disruption that results when the teacher calls on an unprepared student, or is confronted by a classroom desk covered with written requests. Finally, and most importantly, it may well be the only way to encourage reluctant students to speak informally with their teachers outside of class. In short, a skilled teacher can turn the pass request into a useful tool.

131. Actually, commentators have drawn an analogy between legal education and training much more severe than athletic coaching. Several writers have used a military analogy for first year courses. Some, not all, consider that a positive idea. Professors Morgan and Maguire refer to the "Golden Age" of the case method as the "Spartan Era." MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE vii-viii (1951), *quoted in* Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379, 388 (1952).

Professor Bergin uses a similar military analogy when he describes law teachers as experiencing a kind of intellectual schizophrenia. Bergin, *The Law Teacher, A Man Divided Against Himself*, 54 VA. L. REV. 637, 638 (1968). The typical law teacher believes, according

most modern law schools, only a few teachers would likely agree with him. Indeed, his critics may be right. Nevertheless, Professor Peairs's argument raises an intriguing thought in view of this paper's earlier suggestion that many teachers miss opportunities to combine training in substantive law with training in skills. Perhaps Professor Peairs was right that skills can be taught only in a rigorous setting.

But skills are not all that law teachers teach. All substantive courses, even the heavily skills-oriented first year courses, must deal

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to Professor Bergin, that he can be "at one and the same time, an authentic academic and a trainer of Hessians." *Id.* Professor Jones also describes first year courses as a military setting. Jones, *Notes on The Teaching of Legal Method*, 1 J. LEGAL EDUC. 13, 14 (1948). Professor Fuller refers disparagingly to the "boot-training" idea in a thought provoking essay. Fuller, *On Teaching Law*, 3 STAN. L. REV. 35, 37 (1950).

Robert Redmount, a lawyer and clinical psychologist, brings to his analysis of legal education in this context some startling observations:

> The aura and mystery surrounding the classroom experience, as Llewellyn contemplated it, and its resulting accountabilities, are not as enigmatic as they may seem. At least they are not if one turns an ear to psychological explanation, and chooses to listen to it. In many respects, the traditional law-school teaching methodology (commonly called "Socratic") is not unfamiliar. It may be associated with military basic training, or with a kind of interrogation familiar to constabulary and intelligence operatives. First, the mentor creates consternation, if not confusion, by assuring the learner that he will learn and then the learner is rudely reminded of how little he understands. A subtle application of aggression creates pain and induces fear. (Students of behavioral conditioning will recognize the process.) However, the demeanor of the teacher (administrator of pain) is not entirely or even consistently negative; he blends into the process an offering of assurance and support. He mixes a benign manner which says that he seeks to help more than to hurt. He suggests and demonstrates that the result will be worth the pain. The student is supposed to learn both to fear and to seek, but most of all he is supposed to become dependent upon the mentor; he is divested of his own mental and emotional bearings.
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> Given the reward system in this traditional classroom, the student becomes eager to please; he seeks to avoid the pain of humiliation and he seeks the pleasure of praise (and grades). His goals are survival and dignity; the only means to these lie in the approbation of the mentor. The urgency to survive makes other interests, feelings, and values remote if not irrelevant. In time, pride develops in becoming successful, and even an arrogance of intelligence and exclusivity develops. One not only learns to think like a lawyer, but one also learns what it is to feel like a lawyer, to be, perhaps on the other side of a dependence relationship. The process is roughly what psychologists call "identification." Fierce pride and confidence are its characteristics, but among the effluvia are arrogance, combativeness, narrowness, and deep within perhaps, some suppressed self-revulsion and self-doubt.

Shaffer & Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 190, 196-97 (1976). The reference to Professor Llewellyn in defense of a relaxed setting may be inappropriate. He refers to law school in part as a process for learning how to fight wolves. "[T]o fight wolves, you have to know wolves. And that wolf-study is a proper part of legal training." Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 658 (1935). For other defenses of a rigorous style of classroom discussions, see *supra* note 116.

with important substantive bodies of law, and with important issues of public and private morality. These ideas cannot be explored adequately in a tension-filled atmosphere.[132] Furthermore, teachers in

132. Commentators Shaffer and Redmount concur:

> These low-pressure teaching styles seem to us to have a number of advantages which neither the probing ("Socratic") style nor the lecture have. The professor who generates and tolerates student ideas and feelings, in this casual question-and-answer approach, contributes to an accepting climate in his classroom. He accepts the students; they accept him and one another. The level of tension is not artifically elevated, but exists as an appropriate and effective tension for learning; it is sustained in the exchange of ideas and in an intrinsic interest in learning what is to be learned. Students are encouraged to inquire and to risk the exploration of their own feelings and attitudes. They are not being attacked; a conjoining and cooperative learning effort then seems to occur spontaneously. In all likelihood, this tenor in the classroom, which is not devoid of tension, is comfortable and spontaneous for all participants (and, to that extent, the teacher is also a learner). The professor is liberated by this comfort and by the capable and interested students who share it with him; he becomes free to turn his conscious attention to strategies for organizing the content of the course, using the materials he has assembled for study and sequencing topics, reinforcement of student interest, and feedback.

Shaffer & Redmount, *supra* note 129, at 216 (1976).

Other writers also seem to favor a relaxed setting, at least to some extent. Dean Carrington, in his comparison of the training of a cub pilot and a lawyer, notes that when law students make mistakes, unlike Twain's riverboat pilots, the mistakes do not have "potential for disaster." Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226 (1984). I think that students should be reminded repeatedly that their mistakes in class do not lead to disaster, as mistakes in practice might. A judicial clerk near the conclusion of an indictment of abuse endemic to the Socratic method, makes an interesting observation about "rigor" in the classrooms:

> A final observation supports the claim that personal and institutional abuses can be limited. Many professors still do not understand exactly what it is that harms a student. Their concern lies with mischosen words, jokes that went too far, and over sensitive students. But particular acts or incidents are not the heart of the problem. Long-range disillusionment and withdrawal are not the result of a joke here or a demand for rethinking there. Instead, the general problem is one of position and overall sensitivity. Students' pain is founded on a feeling that they have been assigned to the gutter. While they are there, someone older and "smarter" (who in turn agrees and shows he is smarter) wants to kick them and really knows how to kick them well. Moreover, there are few Good Samaritans in the crowd likely to offer a bandage. Thus, the need for reform is a reflection of the basic lack of respect for the student as an intellectual or human being.

Childress, *The Baby and the Bathwater: Salvaging a Positive Socratic Method*, 7 OKLA. CITY U. L. REV. 333, 345-46 (1982). Professor Whaley, in a folksy essay, makes a related point. He suggests that teachers should quickly learn the names of their students, even in large classes. Whaley, *Teaching Law: Advice for the New Professor*, 43 OHIO ST. L.J. 125, 134-35 (1982). This little "trick," in Professor Whaley's terms, can generate among students a tremendous amount of good feeling about a teacher.

Professor Redmount describes the value of a teacher's "caring role" when he discusses the "moral dimension" of the teacher-student relationship:

> The moral dimension of the relationship between teacher and student has been expressed and programmed best by Rogers, a distinguished humanist and psychologist. Addressing himself specifically to the teacher-student relation and

law schools play many roles other than those of skills trainers. They must lead students, directly or indirectly, to an understanding of very complex principles. They must help students learn to recognize when values conflict, and learn to choose wisely between these complex principles. Finally, teachers must provide students with "role models"—models of people leading lives of principle and integrity in the law. None of these nonskills roles require rigor. All of them, in fact, demand the opposite.

Perhaps law teachers best serve their students by moving back and forth between two roles, one of relentless demands, the other of caring thoughtfulness. In the early part of a term, for example, when skills might be the major focus, teachers might best help their students by being cold and determined virtually all of the time. As the term progressed, however, teachers might increasingly move toward a more caring role, using the colder role only in connection with class discussion of skills exercises. Finally, by the end of the term, the teacher seen by students at the beginning of the course, cold and heartless, might be gone completely, replaced by a physically identical but totally different person.

IV. CONCLUSION

This paper has come full circle. It began with a bizarre metaphor of law students and pods, students turned by legal education into physically indistinguishable alien creatures. That image catches many students' minds. They feel in themselves a change occurring, and not a change for the better. Legal education, they feel, is turning them from considerate and caring people into ruthless and unprincipled ones. The learning of skills is the major cause. Students sense that people who can do the things described in this paper cannot really be people. Furthermore, students sense that the change coming over

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deriving his observations from the way learning occurs in psychotherapy, he postulates three conditions for the teacher-learner relationship that are essential to effective learning. The first is characterized as "unconditional positive regard," where the teacher, in a kind of acceptance without conditions or demands, has and expresses an accepting and a caring attitude toward the student. Second, there must be "emphathic understanding," such that the teacher, in a sense, puts himself in the shoes of his student in order to better sense and understand what the student is experiencing. And third, there must be "congruence" of feeling, understanding, and exhibited behavior, so that a person is not expressing one thing, feeling another, and thinking yet another. To the degree that these are shared attributes between teacher and student, the psychological conditions for trust, understanding, and learning exist.

Redmount, *Law Learning, Teacher-Student Relations, and the Legal Profession*, 59 WASH. U.L.Q. 853, 869 (1982).

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them is inevitable, and, what is worse, irreversible. But that is where another transformation, or at least another perceived transformation, can serve for some students as a redeeming force. Students who watch this other transformation—a cold and relentless teacher turning into a considerate and helpful person—see happening in someone else exactly the opposite of what they see happening in themselves. And perhaps that image, one demonstrating that alienness is not inevitable in the law, can be the final skills message students carry out of class.